IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,
Petitioners,

v.

SHELL OIL COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SHELL OIL COMPANY

STEPHEN N. SHULMAN
JOSEPH A. ARTABANE
MARK C. ELLENBERG
CADWALADER, WICKERSHAM & TAFT
11 Dupont Circle, N.W.
Suite 450
Washington, D.C. 20036
Counsel for Respondent

October 12, 1979

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SEATRAIN SHIPBUILDING CORPORATION, *et al.*,

Petitioners,

v.

SHELL OIL COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT SHELL OIL CO.

QUESTION PRESENTED

Did the Court of Appeals correctly hold that the Secretary of Commerce lacks authority to waive permanently restrictions required by the Merchant Marine Act, 1936, as amended, against use in domestic trade of a vessel built with construction-differential subsidy when the Act not only requires such vessels to engage exclusively in foreign trade but expressly limits the Secretary's authority to waive domestic trade restrictions to periods of no more than six months in any year?

STATEMENT OF THE CASE

Respondent Shell Oil Company ("Shell") brought this case to obtain a declaration that certain actions taken by the Federal parties are contrary to the Merchant Marine Act, 1936, as amended ("the Act") and to obtain an injunction prohibiting implementation of those actions. The case was filed in the United States District Court for the District of Columbia on September 22, 1977. On November 22, 1977, Judge Charles R. Richey issued a Memorandum Opinion and Order adjudicating cross-motions for summary judgment. *Shell Oil Co.* v. *Kreps*, 445 F.Supp. 1128 (D.D.C. 1977) (Pet. App. 65a-95a).[1] The motions on both sides were granted in part and denied in part. Shell appealed that portion of the Order which granted summary judgment to petitioners and the Federal parties and denied Shell the requested declaration and injunction. On February 6, 1979, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court and ordered that the requested declaration and injunction be entered. *Alaska Bulk Carriers, Inc. v. Kreps*, 595 F.2d 814 (D.C. Cir. 1979)(Pet. App. 1a-51a).

The controversy arises from a letter dated August 31, 1977, in which Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs ("Assistant Secretary") and Howard F. Casey and Samuel B. Nemirow, members of the Maritime Subsidy Board ("MSB") ruled that the T.T. STUYVESANT ("STUYVESANT"), a 225,000 deadweight ton

[1] Materials in the Appendix to the Petition for a Writ of Certiorari are cited "Pet. App. ____." Materials in the Appendix to Petitioners' Brief are cited "App. ____."

("dwt") oil tanker could be operated in the domestic trade without limitation, provided that construction-differential subsidy ("CDS") be repaid over 20 years. (Pet. App. 11a; App. 34-38) A second letter of the same date ruled that government loan guarantees totalling $60,200,000 would be approved. (Pet. App. 11a; App. 39-11).[2] The Assistant Secretary and MSB members took these actions as delegatees of Juanita M. Kreps, Secretary of Commerce ("Secretary").

Prior to these actions, the STUYVESANT was barred from domestic trade because it was built with the aid of CDS. By statute, CDS may be paid only for the construction of vessels to be used in the United States foreign trade, and owners of vessels built with CDS are required to restrict trade activity accordingly. Merchant Marine Act, 1936 §§ 501, 506, 46 U.S.C. §§ 1151, 1156. The funds represent the approximate cost differential between building a ship in the United States and abroad, thus compensating for the competitive advantage enjoyed by foreign vessels. Merchant Marine Act, 1936, § 502, 46 U.S.C. § 1152. Since United States domestic trade is restricted to vessels built in the United States, no CDS is necessary for vessels engaging in this trade. Jones Act § 27, 46 U.S.C. § 883.

The CDS funds were paid pursuant to an agreement of June 20, 1972, between MSB and Seatrain Shipbuilding Corporation ("Seatrain"), the builder of the STUYVESANT. On the same date, Polk

[2] Guarantees in the amount of $28,845,000 had already been extended during the construction period. New guarantees in the amount of $31,355,000 were to be extended upon the sale of the STUYVESANT. The CDS amounted to $27,200,000. (Pet. App. 8a; App. 439).

Tanker Corporation ("Polk"), as the vessel purchaser, agreed to operate the STUYVESANT exclusively in the United States foreign trade. (Pet. App. 9a).

On July 8, 1977, as the vessel neared completion, Polk filed with MSB a request that the domestic trade restrictions of sections 501 and 506 be waived with respect to the STUYVESANT for a period of three years, provided a pro rata portion of CDS was repaid. The request stated that if a waiver were granted, the STUYVESANT would be chartered to the SOHIO Petroleum Corporation ("SOHIO") for use in the Alaskan oil trade. The sole statutory authority for the waiver cited in the request was section 207 of the Act, 46 U.S.C. § 1117. (Pet. App. 10a-11a; App. 18-33). The MSB, by published notice, opened Docket S-565 for the Polk request and invited public comment. 42 Fed. Reg. 37229 (1977).

At the time these actions occurred, Shell was the purchaser under a construction contract entered into on February 28, 1975 of two 188,500 dwt San Diego Class Tankers being constructed by National Steel and Shipbuilding Company, San Diego, California ("NASSCO"). Both vessels were to be built without government subsidies or financing aids. The approximate cost of each vessel was to be $92,000,000. The first vessel was scheduled for delivery in early 1978 and the second vessel in September, 1978. (App. 7)[3]

The two NASSCO vessels were designed to meet the highest world and United States safety and environmental standards for tank vessels. Each vessel has segregated ballast meeting Inter-

[3] The first vessel was delivered on March 14, 1978. The second vessel was delivered on October 25, 1978.

Governmental Marine Consultative Organization standards, double bottoms, and advanced cargo handling, safety, and navigation features. (App. 8).

At delivery, each NASSCO vessel was sold to a United States citizen, and Shell, with the approval of the Maritime Administration, entered a time charter for an initial period of 23 years. (App. 8). Under the time charters, Shell has agreed to pay a rate which covers both operating costs and, over 23 years, the original cost of each vessel plus interest. Shell is obligated to make these payments whether or not the vessels are employed. The industry refers to such agreements as "hell or highwater" charters. (App. 8).[4]

Shell caused the vessels to be built for the purpose of engaging in the Alaskan oil trade. Prior to executing the construction contracts, Shell projected that either the ships would be needed by Shell to transport Alaskan crude to its own refineries or that, due to a shortfall in available unsubsidized vessel tonnage, other oil companies owning Alaskan crude would need the vessels. (App. 181-182).[5] There is no trade other than the Alaskan oil trade in which the vessels can economically be used. In other domestic trades, there is no other demand for oil tankers of the

[4] Shell, as a non-U.S. Citizen corporation under the Shipping Act of 1916, as amended, 46 U.S.C. § 801, *et seq.*, cannot own vessels which are to be operated in the United States coastwise trade.

[5] At the time, Shell did not know whether or not it would be successful in obtaining rights to Alaskan crude. As it happened, Shell did not obtain such rights. Hence, the crude belonging to other oil companies became the sole prospect for employment of the Shell vessels.

size of the NASSCO vessels. The vessels cannot be used economically in the foreign trade because they were not built with subsidy. (App. 182).

Shell made vigorous attempts, dating back to the fall of 1976, to charter the NASSCO vessels. As of August 31, 1977, Shell had not concluded any charter agreements.[6]

On August 8, 1977, Shell, among others, filed comments in Docket S-565 indicating that the Polk request was beyond the lawful authority of the MSB and that Shell's interests could be seriously harmed if the request were granted. (Pet. App. 10a-11a; Protest of Shell Oil Company, Appendix A to Memorandum of Points and Authorities in Support of Shell Oil Company's Motion for Summary Judgment).

On August 25, 1977, in correspondence not served on Shell or any other party to Docket S-565, Polk requested a permanent waiver for the STUYVESANT, coupled with a repayment of CDS over twenty years. As before, if the waiver were granted, the vessel would be chartered to SOHIO for three years. Polk withdrew the prior request for a three year waiver on August 26, 1977. MSB, in the letters of August 31, informed Polk that the August 25 request would be granted. The letters were, like the request, not served on Shell or published in the Federal Register. (Pet. App. 10a-11a).

[6] On March 14, 1978, Shell time-chartered the first vessel to SOHIO for a period of two years. The charter can be extended for a third year at the option of SOHIO. On October 25, 1978, Shell time-chartered the second vessel to SOHIO for a period of two years. SOHIO also has an option to renew this charter for a third year.

The August 31 letters permit repayment of CDS through the execution of a twenty year promissory note providing for semi-annual level installments of principal and interest commencing on the date of vessel delivery. Interest is to be paid at the same rate paid on the government guaranteed bonds sold at delivery of the vessel. Interest is not to be paid on the CDS funds for the approximately five-year period they were held and used by Seatrain. The note is secured by a third mortgage on the vessel. The two letters cite no authority for the waiver of trade restrictions or the acceptance of a promissory note as repayment of CDS. (Pet. App. 11a).

Following issuance of the August 31 letters, a closing transaction at which the STUYVESANT was to be sold and the new Title XI guaranteed bonds were to be issued was scheduled for September 23, 1977. On September 12, 1977, Shell filed a request for review by the Secretary of Commerce. On September 22, 1977, no response having been heard from the Secretary, Shell filed a civil action in the United States District Court for the District of Columbia seeking review of the August 31 actions. The same day, Judge Oliver Gasch of the United States District Court temporarily restrained the Board and Assistant Secretary from participating in the closing. *Shell Oil Co.* v. *Kreps*, No. 77-1645 (Temporary Restraining Order) (D.D.C. Sept. 22, 1977). The restraining order was dissolved by Judge Charles R. Richey on September 30, 1977. Judge Richey stated that Shell would not suffer irreparable harm until the first NASSCO vessel was delivered. *Shell Oil Co.* v. *Kreps*, No. 77-1645 (Findings of Fact and Conclusions of Law) (D.D.C. Sept. 30, 1977) (App. 168).

The STUYVESANT was delivered on September 30, 1977. At the closing, Polk unconditionally transferred title to the vessel to United States Trust Company ("USTC") as owner-trustee for the equity-owner, General Electric Credit Corporation ("GECC"). Polk also assigned to USTC, as trustee for GECC, its obligations on the $28,845,000 in government guaranteed bonds sold to finance the STUYVESANT's construction and a $27,200,000 promissory note payable to the Secretary of Commerce. The assignments to USTC of both the obligations on the bonds and the promissory note were without recourse. USTC, as trustee, issued and sold an additional $31,355,000 in government guaranteed bonds and paid Polk $32,600,000, which was placed in escrow for the benefit of GECC. The note, bonds, and escrow fund totaled $120,000,000.[7] USTC bareboat chartered the vessel to Queensway Tankers, Inc. The bareboat charter was on a "hell or highwater" basis. Queensway time-chartered the STUYVESANT to SOHIO for three years. (Pet. App. 70a-71a).

In the order and memorandum opinion of November 22, 1977, adjudicating cross-motions for summary judgment, the District Court held that the Secretary had authority to waive trading restrictions and to accept promissory notes, but could only take such action after making a determination that it would not result in unfair competition to the unsubsidized fleet. Because the Secretary did not consider

[7] As a consequence of this transaction, the petitioners no longer have an economic stake in the proceedings before this Court. Regardless of the outcome, Polk and Seatrain have been relieved of all obligations. Their parent corporation, Seatrain Lines, Inc., does have an interest in that it guaranteed the assigned obligations. *Brief for the Petitioners*, at 11 n.2.

the competitive effects of the August 31 actions, the court held the actions to be arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). The court thus ordered the agency to conduct a new proceeding in which it evaluated the competitive impact of the waiver.[8]

In the decision of February 6, 1979, the United States Court of Appeals for the District of Columbia Circuit held that the Secretary had no authority to waive permanently trading restrictions on vessels built with CDS. (Pet. App. 1a-51a). On March 22, 1979, the full court denied appellees' suggestions for rehearing *en banc*, with only the originally dissenting judge noting a dissent. (Pet. App. 63a-64a).

In this Court, the Federal parties raise an argument, first initiated in their suggestions for rehearing *en banc*, that the Court of Appeals lacked jurisdiction.

[8] On January 6, 1978, the MSB, after receiving written submissions on the question of competitive effect and denying Shell's request for a trial-type hearing, concluded that the August 31, 1977 actions were valid. *T. T. Stuyvesant-Repayment of CDS, Operations in Jones Act Trade*, MSB Docket No. A-124 (Final Opinion and Order on Reconsideration) (Maritime Administration, U.S. Dept. of Comm. 1978) (App. 566). Shell timely requested Secretarial review of the MSB Order, but such review was declined. On October 14, 1978, Shell filed in United States District Court a complaint challenging the validity of the MSB Order. Following the Court of Appeals' decision in the proceeding now before this Court, the October 14 action was dismissed without prejudice.

SUMMARY OF THE ARGUMENT

The actions of the Federal parties in allowing the STUYVESANT to engage in domestic trade, despite its construction with CDS, are contrary to the letter and spirit of the Act. Analysis of the plain language of the Act, particularly sections 501, 506, and 509, makes clear that the actions are prohibited. Section 501 permits subsidy to be paid only for ships to be used in foreign trade. Section 506 requires all owners of vessels built with CDS to agree to restrict vessel activity to the foreign trade, with limited exceptions for incidental domestic use. Nonincidental domestic use of vessels built with CDS is expressly limited to six months in any year. Section 509 makes clear that government aid to vessels built for the domestic trade shall not include CDS.

Additional intrinsic indicia of legislative intent support a literal reading of the statutory language. First, the implied authority to waive permanently trading restrictions is an exception to the general statutory rule that vessels built with CDS shall be used exclusively in foreign trade. Such implied exclusions are not favored. Second, Congress expressly provided five exceptions to the general rule restricting vessels to foreign trade. Where one or more exceptions are created by expression, additional exceptions cannot be created by implication. Third, the statutory construction urged by petitioners and the Federal parties renders the six month limitation of section 506 meaningless. A statute should be construed to give all provisions meaning. Fourth, Congress provided in Title VI of the Act, concerning operating-differential subsidy, a waiver mechanism closely analogous to that read into Title V of the Act

by petitioners and the Federal parties. Congress should be presumed to have intentionally excluded from one section of a statute that which it intentionally included in another.

Petitioners and the Federal parties have failed to identify any statutory provision authorizing the permanent waiver of trading restrictions on vessels built with CDS. Section 504 of the Act, 46 U.S.C. § 1154, expressly recognizes the limitation on the Secretary's contract authority contained in Section 506. Reorganization Plan No. 21 merely recounts in summary form the powers expressly granted in the numerous provisions it covers. Section 207 of the Act, 46 U.S.C. § 1117, is a carefully limited provision designed to implement authority found elsewhere in the Act.

In addition to the indicia of congressional intent intrinsic to the Act, the legislative history demonstrates conclusively that section 506 was intended to cover all instances of permissible waivers and that waivers for nonincidental domestic use of vessels built with CDS must be limited to six months in any year. The CDS program was enacted to replace the mail subsidy program which had unfairly undermined domestic competition. A version of section 506 which would have permitted precisely what defendants wish to do in this case was passed by the House in 1935, but ultimately rejected by Congress in 1936 as posing too great a threat to the domestic trade. In 1938, section 506 was revised to read virtually as it does today. The amendment was for the purpose of clarifying Congress' intent to prohibit permanent waivers. It removed from the Act the only language which even arguably authorized such waivers.

The extrinsic evidence of congressional intent relied on by petitioners and the Federal parties to support their construction of section 506 is unpersuasive and legally inadequate. The sole evidence supporting petitioners' and the Federal parties' construction of section 506 as enacted in 1936 is an isolated statement made by Senator Guffey. The statement was never endorsed by Congress or any congressional committee and is not consistent with the interpretations expressed by Congress and by Maritime Commission Chairman Kennedy in 1938, when Section 506 was amended. Petitioners' and the Federal parties' evidence consists also of a relatively recent administrative interpretation which, according to all traditional criteria, is wholly undeserving of judicial deference. Petitioners and the Federal parties rely finally on an alleged congressional acquiescence in the agency interpretation through a 1972 amendment of Title XI of the Act. Not only is this evidence ambiguous at best, but the amendment of a section of a statute by a later Congress deserves little weight in determining the original congressional intent behind a wholly separate section not part of the amendment.

The permanent waiver of trading restrictions on vessels built with CDS will disrupt the domestic trade, contrary to the fundamental purpose of section 506. Persons planning to construct unsubsidized vessels must be able to assess future vessel supply in the legislatively protected domestic market. Waiving entry restrictions for vessels built with CDS makes such assessments impossible.

The Court of Appeals had jurisdiction. The judgment was properly appealed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. It was also properly appealed as a denial of injunctive relief under 28 U.S.C. § 1292(a) and even meets the tests for appealability under 28 U.S.C. § 1291 in the absence of a Rule 54(b) certification.

ARGUMENT

A. THE MERCHANT MARINE ACT, 1936, PROHIBITS PERMANENT WAIVERS OF TRADING RESTRICTIONS ON VESSELS BUILT WITH CDS

1. Introduction.

The fundamental issue in this appeal involves the authority of the Secretary of Commerce. Specifically, it involves the question whether or not the Secretary has authority to waive permanently restrictions against the use of a vessel built with CDS in domestic trade.

It should be emphasized that the question is the authority to grant a permanent waiver. It is not the authority to receive repayment of CDS. As the succeeding discussion will make clear, section 506 of the Merchant Marine Act, 1936, as amended, authorizes the Secretary to grant waivers for a period of six months in any one year. When such a waiver is granted, section 506 also requires a partial repayment of CDS measured by the relationship between the period of the waiver and the economic life of the vessel.

The touchstone of the section—and of the question—is the limitation on the period of the waiver. It cannot exceed six months. The partial repayment of

CDS is a consequential adjunct. It becomes operational only after the Secretary has determined—upon application—that the temporary waiver may appropriately be granted in the first place.

The position of petitioners and the Federal parties, in this regard, is an illustration of the colloquial tail wagging the dog. The section contains not one word authorizing a permanent waiver. Petitioners and the Federal parties, in the final analysis, can only get to the conclusion of permanent waiver by extrapolating it as consequence of full repayment. Just as partial repayment yields temporary waiver, full repayment—on this view—yields permanent waiver.

But the point is that the repayment is a consequence of the waiver, not the waiver a consequence of the repayment. Waiver is limited to one six month period in any year. It cannot spur a greater measure of repayment. Repayment does not even become an issue until after the merits of the application for waiver have been determined.

The matter of waiver is a matter of use of the vessel in domestic trade. It implements a careful tuning of fundamental policy interests regarding the adoption of a subsidy program in the first instance. Partial repayment of subsidy is required as the minimum demand of equity. It is neither a vehicle for the Government to recover subsidy once awarded, nor a means for the purchaser to acquire expanded trade opportunity.

Permanent waiver is not allowed for reasons that have nothing to do with the extent of repayment of CDS. As the discussion of legislative history under

subhead 4 of this argument will show, a clear wall between domestic trade and foreign trade has been erected. On the one hand, the Jones Act preserves the domestic trade to vessels built in the United States, and, thus, saves such vessels from foreign competition enjoying cost advantages. On the other hand, the Merchant Marine Act, 1936, establishes a subsidy program for United States vessels in foreign trade which compensates for the cost advantages of the foreign vessels with which they must compete. In fairness to the United States vessels in domestic trade, which do not share in this subsidy, the Act also restricts the United States vessels built with subsidy to foreign trade.

The transfer of vessels from foreign to domestic trade, even with full subsidy repayment, can only disrupt the free market mechanism so carefully preserved for the domestic trade by the Jones Act. Firms deciding to construct ships without CDS must be able to assess future demand and supply in that market. If ships supposedly limited to foreign trade can enter the domestic market whenever economic conditions make it desirable for them, future tonnage supply will be impossible to assess. Under these conditions, no capital will be invested in unsubsidized vessels.

Once built with CDS, a vessel takes its defined place in the supply and demand schedule of foreign trade potential, but it is simultaneously removed from the domestic trade inventory. The entire economics of the unsubsidized fleet is built on this principle.

Repayment of CDS, full or partial, simply does not reach these considerations. The issue of the

Secretary's authority to alter the fleet balance by a permanent waiver far transcends any question about the extent of repayment of CDS.

2. The Plain Language of the Act Prohibits Permanent Waivers.

Since the inception of these proceedings, the parties have identified but one provision in the Merchant Marine Act, 1936, addressing the waiver of trading restrictions on vessels built with CDS — section 506. That section limits waivers to six months in any year. Petitioners' and the Federal parties' attempts to finesse this rather fundamental defect in their position are creative, but ultimately unavailing.

Title V of the Act, as amended, 46 U.S.C. §§ 1151-1161, creates authority for the payment of CDS. Sections 501 and 506 of the Act make clear, on their face, that CDS may be paid only for construction of ships used exclusively in the United States foreign trade and that ships built with CDS may not engage in domestic trade on a permanent basis. Section 501 provides, in relevant part,

> (a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel *to be used in the foreign commerce of the United States.* No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements *of the foreign commerce of the United States,* [and] will aid in the promotion and development of such commerce . . . .
>
> (c) Any citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in reconstructing or reconditioning any vessel that is *to be used in the foreign commerce of the United States.* If the Secretary of Commerce, in the exercise of his discretion, shall determine that the granting of the financial aid applied for is reasonably calculated to carry out effectively the purposes and policy of this chapter, *the Secretary of Commerce may approve such application* and enter into a contract or contracts with the applicant therefor providing for the payment by the United States of a construction-differential subsidy that is to be ascertained, determined, controlled, granted, and paid, *subject to all the applicable conditions and limitations of this subchapter* . . . .

46 U.S.C. § 1151 (emphasis added).

Section 506 provides, in full,

> *Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade,* or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a

round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that portion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. *The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter.* Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

46 U.S.C. § 1156 (emphasis added).

Section 506 requires all owners of vessels built with CDS to agree to restrict vessel activity to the foreign trade and provides limited exceptions. The exceptions concern four types of voyages in which domestic trade is present, but is merely incidental to foreign trade. The fifth category, which could encompass solely domestic voyages, is expressly limited to six months out of any year.

As aptly observed by the Court of Appeals,

> Section 506, therefore, is *the clause* in the Merchant Marine Act which separates the two fleets, *i.e.*, the Jones Act domestic trade fleet (unsubsidized), and the U.S. foreign trade fleet (subsidized). The statutory language is strong: "Every owner. . .shall agree." It is not just the original builder or first purchaser, but every owner during the life of the vessel who must agree to the restriction. The restriction is "that the vessel shall be operated exclusively in foreign trade," for the obvious purpose aforementioned. The restrictive language also refers to a subsidy which "has been paid." The idea is one of permanence; once the ship has been constructed by Government assistance of up to 50% of its original construction cost, the ship is dedicated to the U.S. foreign trade. Payment of the subsidy stamps indelibly the character of the ship then and thereafter.

Alaska Bulk Carriers, Inc. v. *Kreps*, Pet. App. 14a (emphasis in original; footnotes omitted).

The only section in Title V providing for assistance to vessels in the domestic trade is section 509, 46 U.S.C. § 1159. That section permits the Govern-

ment to pay for mandatory national defense features and to finance up to 87.5 percent of the vessel purchase price. The section expressly states, however, "no construction-differential subsidy shall be allowed." 46 U.S.C. § 1159.

On its face, then, the Act prohibits the actions taken by the Federal parties. Vessels built with CDS are restricted to foreign trade and the waiver of this trading restriction for nonincidental domestic use is limited to six months in any one year. This alone should determine the outcome here. As this Court has often recognized, there is no better evidence of the purpose of a statute than the plain meaning of the words Congress has chosen to express its wishes. *United States* v. *Bornstein*, 423 U.S. 303, 309-11 (1976); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543 (1940).

Two very recent decisions by the Court are dramatic illustrations of this basic concept. In *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), the Court foiled the attempt of a federal agency to circumvent the plain language of the Endangered Species Act of 1973. The Act, as relevant, provided,

> All . . . agencies shall . . . utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species* which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

16 U.S.C. § 1536 (1976) (emphasis added).

The Tennessee Valley Authority ("TVA") contended that common sense required that the statutory term "actions" be construed to exclude the completion of projects started before the Act was passed by Congress. If projects predating the Act were not excluded, the TVA would be forced to abandon a virtually completed multimillion dollar dam. Operation of the dam would destroy a listed threatened species, the snail darter. The Court held that the plain language of the Act had to be followed, regardless of the equities marshalled by the TVA. The Chief Justice observed,

> It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.

437 U.S. at 172-73.

To the same effect is *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103 (1978). In *Sloan*, the Court had to construe section 12(k) of the Securities Exchange Act of 1934. The section, on its face, permits the Securities and Exchange Commission ("SEC") summarily to suspend trading in a security "for a period not exceeding ten days." 15 U.S.C. § 781(k). The SEC contended that the section permitted a series of consecutive ten day suspensions.

The Court rejected the Commission's assertion that its interpretation of section 12 was the only one that furthered the Act's remedial purposes. The Court observed,

> [T]he only question confronting us is whether, even upon a periodic redetermination of "necessity", the Commission is statutorily authorized to issue a series of summary suspension orders based upon a single set of events or circumstances which threaten an orderly market. This question must, in our opinion, be answered in the negative.
>
> The first and most salient point leading us to this conclusion is the language of the statute. . . . The Commission would have us read ["for a period not exceeding ten days"] as a limitation only upon the duration of a single suspension order. So read, the Commission could indefinitely suspend trading in a security without any hearing or other procedural safeguards as long as it redetermined every 10 days that suspension was required by the public interest and for the protection of investors. While perhaps not an impossible reading of the statute, we are persuaded it is not the most natural or logical one. The duration limitation rather appears on its face to be just that — a maximum time period for which trading can be suspended for any single set of circumstances.

436 U.S. at 111-12.

The Court's analysis in *Sloan* is easily applicable here. Petitioners' and the Federal parties' reading of section 506 may not — perhaps — be an impossible one, but it is not — certainly — the most natural or logical. The six month duration limitation in section 506 is just that, a maximum time period for which trade restrictions may be waived in any one year.[9]

Four additional intrinsic indicia of congressional intent reinforce the conclusion that Congress intended what its language does: to prohibit permanent waivers of trading restrictions on vessels built with CDS. First, implied exceptions to express statutory provisions are not favored. *See, e.g.*, *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 198 F.2d

---

[9] Petitioners and the Federal parties suggest that the plain language of Title V should not be rigorously applied because the broad purposes of the Act require broad secretarial authority. Clearly, however, the mere fact that the purposes of an act are broad cannot justify deviation from specific congressional commands. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 405-06 (1976); *Commissioner* v. *Gordon*, 391 U.S. 83, 92-93 (1968); *Bissette* v. *Colonial Mortgage Corp.*, 155 U.S. App. D.C. 360, 477 F.2d 1245, 1246-47 (1973). The plain language of a statute has been effectively modified by judicial interpretation to avoid frustration of congressional purpose only in rare instances, where the conflict between the language and the purpose has been direct and compelling. *See, e.g.*, *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 348-49 (1968); *United States* v. *Maryland*, 121 U.S. App. D.C. 258, 349 F.2d 693, 695 (1965); *c.f. Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966). No such conflict exists here.

637, 644-45 (6th Cir. 1952), *cert. denied*, 344 U.S. 897 (1952); *MacQuarrie* v. *McLaughlin*, 294 F.Supp. 176, 178 (D. Mass. 1968), *aff'd*, 394 U.S. 456 (1969); *Knapczyk v. Ribicoff*, 201 F.Supp. 283, 285 (N. D. Ill. 1962). In this case, the Federal parties are not merely seeking an implied power to amend CDS contracts, but an implied exception to the statutory prohibition against use of vessels built with CDS in domestic trade.

Second, where a statutory mandate is followed by specifically enumerated exceptions, the enumerated exceptions are presumed to be exclusive. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 188 (1978); *National Railroad Passenger Corp.* v. *Nat'l. Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Continental Casualty Co.* v. *United States*, 314 U.S. 527, 533 (1942); *Saxon* v. *Georgia Ass'n of Independent Insurance Agents, Inc.*, 399 F.2d 1010, 1013-14 (5th Cir. 1968); *Gotkin* v. *Miller*, 379 F.Supp. 859, 865 (E.D.N.Y. 1974), *aff'd*, 514 F.2d 125 (2d Cir. 1975); *Herzberg* v. *Finch*, 321 F.Supp. 1367, 1369 (S.D.N.Y. 1971); *see* Pet. App. 15a-16a & n.31. Here, the Federal parties seek an implied exception in the face of the five specified exemptions discussed above.

Third, the statutory construction advanced by petitioners and the Federal parties would nullify the six month limitation in section 506. Before the District Court, these parties contended that Section 506 applies to "temporary" waivers, but not "permanent" ones. Since permanent waivers are not barred by section 506, the argument went, the Secretary is free to exercise her general contracting authority to remove the trading restrictions. If, however, the Secretary may amend CDS contracts to

waive restrictions "permanently," she can also reamend them to permit vessels back into the CDS program at a later date. This is especially true where, as here, CDS is "repaid" only by a long term promissory note. The six month limitation can thus be evaded with ease.

In the Court of Appeals, the Federal parties, recognizing that the contract theories advanced in support of their actions would nullify section 506, made the remarkable concession that the Secretary lacks the *authority* to permit a vessel to reattain subsidy status once subsidy has been repaid. Indeed, they stated that *section 506* prohibits them from reconverting the repayment of the note to a resumption of subsidy. *Alaska Bulk Carriers, Inc. v. Kreps, Brief for the Secretary*, at 37 n.26. This admission shows clearly that waiver of trading restrictions on vessels built with CDS is not a simple matter of contract amendment. More importantly, this shows that section 506 has a direct bearing on the "permanent" waiver of trading restrictions. The Federal parties' disavowal of authority to reverse "permanent" waivers may be a practical response to the statutory construction problem created by their actions, but it proves conclusively the philosophical bankruptcy of their position and the position of the petitioners.

In this Court, petitioners and the Federal parties contend that the crucial distinction is not between "temporary" and "permanent" waivers, but between vessels built with CDS which are still subject to the statutorily mandated provisions of the CDS contract and vessels which, by virtue of subsidy repayment and consequent contract amendment, are not. *See*

Brief for the Petitioners, at 26; *Brief for the Federal Parties*, at 52. This construction of the Act is simply at odds with the language of Title V. It ignores the clear commands of section 501 that CDS be paid only for vessels "to be used in the foreign commerce," and of section 509 that, when a vessel is to be used alternatively in the foreign or domestic trade, "no construction-differential subsidy shall be allowed." 46 U.S.C. §§ 1151, 1159.[10] Indeed, it contradicts the very language of section 506 itself. Section 506 applies to "[e]very owner of a vessel for which construction-differential subsidy has been paid . . . ." The statute does not say, as petitioners and the Federal parties would have it, "a vessel for which construction-differential subsidy has been paid and not repaid...."

There is a strong presumption against construing a statute so as to render it ineffective. *Bird v. United States*, 187 U.S. 118, 124 (1902); *United States v. Blasius*, 397 F.2d 203, 207 n.9 (2d Cir. 1968), *cert. dismissed*, 393 U.S. 1008 (1969); *In Re White*, 266 F.Supp. 863, 866 (N.D.N.Y. 1967). There is simply no means by which the Act can be read to permit permanent waivers without rendering section 506 ineffective.

The fourth cannon of construction supporting the Court of Appeals' interpretation of the Act is that Congress should not be presumed to have implied authority in one portion of an act when it expressly conferred the same authority in a parallel portion of the same act. *See, e.g., Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103, 112-13 (1978);

[10] Section 506 must be read in the context of its surrounding provisions. *See Richards* v. *United States*, 369 U.S. 1, 11 (1962).

FTC v. *Sun Oil Co.*, 371 U.S. 505, 514-15 (1963); *Bott v. American Hydrocarbon Corp.*, 458 F.2d 229, 233 (5th Cir. 1972); *J. Ray McDermott & Co.* v. *Vessel Morning Star*, 457 F.2d 815, 818-19 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972); *Pena-Cabanillas* v. *United States*, 394 F.2d 785, 789-90 (9th Cir. 1968). In Title VI of the Act, Congress prohibited the payment of operating-differential subsidy (which represents the differential between paying a United States crew and a foreign crew) to any person engaged in domestic trade, but permitted the Secretary to waive the prohibition. Section 805(a), 46 U.S.C. § 1223(a). Before such a waiver can be granted, the Secretary must conduct a hearing to determine whether "unfair competition" will result. *Id.* This waiver authority closely parallels that sought by petitioners and the Federal parties under Title V and is virtually identical to the authority described by the District Court. No adequate explanation has been, or could be, offered as to why Congress would have failed to make express in Title V what it did make express in Title VI.

All available intrinsic indicia thus reveal an intent by Congress to prohibit flatly permanent trading restriction waivers for vessels built with CDS. The result reached by the Court of Appeals is in complete accord with these legislative guideposts.

3. There is No Statutory Authority For the Permanent Waiver of Trading Restrictions.

Petitioners and the Federal parties have failed not only to establish that the Act does not prohibit permanent waivers of trading restrictions on vessels built with CDS, but to show that there is any authority to grant such waivers in the first instance. In-

deed, petitioners candidly admit, "No provision of the Act authorizes *in haec verba* the deletion from a CDS contract of terms restricting the domestic trading of a vessel built with CDS assistance in exchange for full CDS repayment." *Brief for the Petitioners,* at 20. Absent specific authority in statutory law, the Secretary is not free to permit vessels built with CDS to enter domestic trade. *Alaska Bulk Carriers, Inc. v. Kreps,* Pet. App. 37a.

Petitioners and the Federal parties request that authority to waive permanently trading restrictions be inferred from the "broad contractual powers" purportedly granted the Secretary in sections 504 and 207 of the Act. *Brief for the Petitioners,* at 20-22; *Brief for the Federal Parties,* at 49-51. Neither section 504 nor section 207 authorizes permanent waivers, however. Section 504, 46 U.S.C. § 1154, merely authorizes the Secretary to enter into CDS contracts. Far from being unlimited, the contract authority is carefully circumscribed by the section. In fact, the only language in the section addressing the subject of reducing restrictions indicates that section 506 is controlling. The final sentence reads "the contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, *except to the extent expressly required by law.*" 46 U.S.C. § 1154 (emphasis added); *see Alaska Bulk Carriers, Inc. v. Kreps,* Pet. App. 39a-40a.[11]

[11] The House and Senate Reports accompanying the 1951 amendment adding the last sentence of section 504 to the Act both identify the Section 506 restrictions on domestic trade as limiting the Secretary's contract authority. S. Rep. No. 295, 82d Cong., 1st Sess. 4 (1951); H. Rep. No. 2221, 82d Cong. 2d Sess. 25 (1952).

Petitioners seek support for an expansive reading of section 504 in Reorganization Plan No. 21 of 1950. Of course, as petitioners concede, the Reorganization Plan is not an independent source of authority. Nor does the Plan provide insight into the meaning of the Act. The Plan merely provides for transfer of the functions of "making, amending, and terminating subsidy contracts . . . under the provisions of Titles V, VI, and VII, and sections 301, 708, 805(a), and 805(f) of the Merchant Marine Act, 1936 . . . ." Reorganization Plan No. 21 of 1950, § 105(1), 64 Stat. 1273. The power to make contracts is provided expressly in several of the enumerated portions of the Act, including sections 504 and 502. The powers to amend and terminate contracts are also provided expressly in several of the enumerated portions, including sections 606, 608, and 801. 46 U.S.C. §§ 1176, 1178, 1211. Thus, the Plan does not, as petitioners suggest, interpret the Act, but simply recounts in summary form the powers expressly granted in the numerous statutory provisions it covers.

Reliance on section 207, 46 U.S.C. § 1117, is completely misplaced. Section 207 is not a blunderbuss capable of being used by the Maritime Subsidy Board whenever specific authority is lacking in the Act. Rather, it is designed to implement authority contained in other parts of the Act.

The language of the section itself includes an express limitation on its use. It permits the Board to contract and make disbursements to protect collateral "in the same manner that a private corporation may contract *within the scope of authority conferred by its charter.*" 46 U.S.C. § 1117 (emphasis added). Just as a private corporation is bound by its charter,

the Board is bound by the Act. Title V of the Act limits the Board's authority to waive trading restrictions on vessels built with CDS.

The narrow purposes of section 207 are amply documented by the provision's legislative history. In 1935, the Senate Commerce Committee commented,

> Title II creates a Maritime Authority [now the Board] consisting of five members chosen with regard to their special fitness for efficient discharge of their duties and to serve for long terms of office . . . . The Authority is given a considerable amount of discretion in the solution of its problems . . . . Such discretion, however, must have limits, and *in framing the bill it has been our endeavor to confer no greater powers than are necessary and proper considering the ends in view.*

S. Rep. No. 713, 74th Cong., 1st Sess. 4 (1935) (emphasis added).

In 1938, Maritime Commission Chairman Kennedy appeared before the Senate Commerce Committee to make the suggestion, ultimately accepted by Congress, that the language of section 207 be clarified. Chairman Kennedy gave as examples of the need for the clarification two shipping lines whose financial difficulties would soon place, or already had placed, vessels securing indebtedness in the hands of the Commission. Chairman Kennedy wanted to make certain that the commission could maintain the condition of these vessels. *See Hearings on S. 3078, Before the Senate Commerce Committee*, 75th Cong., 3d Sess., pt. 12, 1157-58 (1938).

In short, section 207 is a "housekeeping statute." As recognized by the Court of Appeals, this section is not an independent grant of power, but a vehicle for implementing powers granted elsewere in the Act. *Alaska Bulk Carriers, Inc.* v. *Kreps*, Pet. App. 41a-42a; *see New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974) (15 U.S.C. § 717o does not confer independent authority to Federal Power Commission).

Judicial interpretation of section 207 has been consistent with the language and history of the provision. In *Dollar* v. *Land*, 87 U.S. App. D.C. 214, 184 F.2d 245 (1950), *appeal dismissed*, 344 U.S. 806 (1952), the court rejected the contention of the Board's predecessor that the section authorized the purchase of a shipping company's stock as collateral. The opinion states,

> It is inconceivable to us that Congress would have left to implication so vast a power. We do not think that if Congress had intended the Maritime Commission to enter upon such ownership and operations it would have left the matter entirely to a clause which merely authorized the Commission to execute contracts.

184 F.2d at 249.

It is similarly inconceivable that Congress would have taken the effort to draft the waiver provision of section 506 and then left the authority to grant permanent waivers to be conferred by implication by

section 207. In its boldest form, petitioners' and the Federal parties' invocation of broad contracting authority and of section 207 would completely bypass the entire question of subsidy repayment. If the Secretary can remove trading restrictions by way of contract amendment, she presumably can do so for any appropriate consideration. The matter of subsidy repayment only arises because of section 506 and, once raised, should properly be viewed as a consequence of, not justification for, an otherwise authorized waiver.

4. The Legislative History of the Act Demonstrates That Permanent Waivers Are Not To Be Permitted.

Not only is the statutory language clear. The intent of Congress with respect to the use of vessels built with CDS in domestic trade is further established by the principal extrinsic indicium of legislative intent, the Act's legislative history.

a. Background of the Act.[12]

The Congressional concern for the integrity of the domestic maritime trade — as its awareness of the need for economic compensation for U.S. vessels competing in foreign trade — is of long standing. In 1789, in the second law passed under the Constitution, Congress enacted a tax on foreign vessels operating in the United States domestic trade. The tax effectively prohibited foreign competition by making such operations uneconomical. Act of July 4, 1789, 1 Stat. 27. A direct prohibition against foreign vessels in the domestic trade was enacted in 1817. Act of March 1, 1817, 3 Stat. 562. A similar prohibition was re-enacted in 1898. Act of February 17, 1898, 30 Stat. 248. This prohibition is presently included in section 27 of the Merchant Marine Act of 1920 (the Jones Act), 46 U.S.C. § 883 (1976).[13]

As for United States vessels competing in foreign trade, assistance was provided in the form of mail subsidy contracts. Under these contracts, ships engaged in foreign trade received payments for transporting United States mail. This subsidy program, which originated in the mid 1800's, was revitalized with the Ocean Mail Act of 1891, 26 Stat. 830, and was expanded by the Merchant Marine Act, 1928, 41 Stat. 988.

By 1936, the mail subsidy program had proved a failure. Not only was it an inefficient means of developing a foreign trade fleet, but it was used by unscrupulous operators to subsidize domestic trade

---

[12] *See generally,* G. Gilmore & C. Black, *The Law of Admiralty,* §§ 11-4 to 11-8 (2d ed. 1975).

[13] Section 27 provides, in relevant part,

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possession thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by section 13 or 808 of this title...

operations. The deleterious impact of the subsidy on domestic trade was chronicled in two well known government studies on the merchant marine. Under the chairmanship of then Senator Hugo Black, the Special Committee to Investigate Air Mail and Ocean Mail Contracts submitted a scathing report to Congress in 1935 ("the Black Report").[14] The report detailed the misuse of subsidy to upset the domestic market as follows:

> It surely cannot be contended that Congress ever intended mail contracts to be let on links of intercoastal routes, wherein the competition to be faced by the operator was only from other American interests. This was well known to Government officials administering the Merchant Marine Act of 1928, but despite that knowledge such contracts were let and are being operated today. Thus there is placed in the hands of the favored contractor a murderous economic weapon *to be used against his American competitors* in a trade wherein vessels of foreign registry *may not engage.* As an example, attention is called to route 37, operated by the Grace interests through the Panama Mail Steamship Co. This route, extending from San Francisco to Habana, Cuba, is a link in the Grace intercoastal service between San Francisco and New York ....

[14] S. Rep. No. 898, 74th Cong., 1st Sess. (1935).

> Another instance is found in the operations of the American Lines Steamship Corporation on route 32 from New York to Balboa, Canal Zone. The American Lines Steamship Corporation is a 100-percent-owned subsidiary of the Atlantic Transport Co. of West Virginia, which is in turn 100 percent owned by the International Mercantile Marine Co. The contractors' vessels operate from New York via Habana, Cristobal, Balboa, San Diego, and Los Angeles to San Francisco. The report of the Postmaster General finds that the payments under this contract, as well as being a mere gratuity to the contractor, *are discriminatory as against 23 other intercoastal lines operating under the American flag without mail-pay aid and consequently serve as a detriment to the American merchant marine.*[15]

The other report on mail contract abuses, cited by the Black Report, was prepared by the Postmaster General for submission to President Roosevelt on January 11, 1935.[16] On the impact of mail subsidies on domestic trade, the report stated,

> The liberal treatment accorded to the operators under the ocean-mail contracts has resulted in much waste and extravagance.

[15] *Id.* 14-15 (emphasis in original).
[16] H.R. Doc. No. 118, 74th Cong., 1st Sess. 3-19 (1935).

[The operators] have also formed corporations to operate intercoastal and coastwise vessels in competition with nonsubsidized American lines, contrary to the spirit of the law, which does not permit the award of mail contracts or subsidies to operators engaged in the coastwise and intercoastal trade. By this means millions of dollars of mail pay has been diverted from use in foreign trade and used to operate in intercoastal and coastwise trade, resulting in unfair competition with nonsubsidized American lines in the same trade. In some cases mail contracts have actually been awarded directly to favored intercoastal and coastwise operators without the necessity of them having to organize subsidiaries to so unfairly compete with other nonsubsidized American lines.[17]

The report concluded,

All American operators in the protected trade should receive the same treatment. Aid in that particular trade should be given to all or none, and any change in policy or law should carry with it the same kind of protection and benefits to all.[18]

Thus, the mail subsidy was faulted for producing the very result complained of by Shell in this case; it was used to compete unfairly in domestic trade. At

[17] *Id.* 11.
[18] *Id.* 19.

the same time, some form of subsidy was necessary to enable United States vessels to compete in foreign trade. The Black report,[19] and a report by the Interdepartmental Committee on Shipping Policy[20] both recognized that foreign shipyard costs were lower than United States yard costs due to low wage scales and direct government subsidies. Both recommended that the United States should compensate for this cost differential through payment of a construction subsidy on United States built vessels to be used exclusively in foreign trade.

Confronted with a subsidy program which undermined the Jones Act and an economic situation demanding a subsidy for foreign trade vessels, President Roosevelt called for legislative reform. In a message to Congress delivered on March 4, 1935, the President requested abandonment of the mail subsidy and implementation of construction subsidy and operating subsidy programs.[21] The President stated,

In many instances in our history the Congress has provided for various kinds of disguised subsidies to American shipping. In recent years the Congress has provided this aid in the form of lending money at low rates of interest to American shipping companies for the purpose of building new ships for foreign trade. It has, in addition, appropriated large annual sums under the guise of payments for ocean-mail contracts.

[19] Black Report, at 43-44.
[20] H.R. Doc. 118, at 22, 30-31.
[21] H.R. Doc. 118, at 1-3.

This lending of money for shipbuilding has in practice been a failure. Few ships have been built and many difficulties have arisen over the repayment of the loans. Similar difficulties have attended the granting of ocean-mail contracts. The Government today is paying annually about $30,000,000 for the carrying of mails which would cost, under normal ocean rates, only $3,000,000. The difference, $27,000,000, is a subsidy, and nothing but a subsidy. But given under this disguised form it is an unsatisfactory and not an honest way of providing the aid that Government ought to give to shipping.

I propose that we end this subterfuge. If the Congress decides that it will maintain a reasonably adequate American merchant marine I believe that it can well afford honestly to call a subsidy by its right name.

Approached in this way a subsidy amounts to a comparatively simple thing. It must be based upon providing for American shipping Government aid to make up the differential between American and foreign shipping costs. It should cover first the difference in the cost of building ships; second, the difference in the cost of operating ships; and finally, it should take into consideration the liberal subsidies that many foreign governments provide for their shipping. Only by meeting this threefold differential can we expect to maintain a reasonable place in ocean commerce for ships flying the American flag, and at the same time maintain American standards.

In setting up adequate provisions for subsidies for American shipping the Congress should provide for the termination of existing ocean-mail contracts as rapidly as possible and it should terminate the practice of lending Government money for shipbuilding. It should provide annual appropriations for subsidies sufficiently large to cover the differentials that I have described.[22]

Congress' response to the President's call for reform was the Merchant Marine Act, 1936. The Committee reports accompanying the bills reported to the House and Senate both expressly state that the legislation is designed to permit United States vessels to compete in foreign trade by providing construction and operating subsidies. The reports note the recommendations of the President, the Black Report, the Postmaster General, and the Committee on Shipping Policy. They also document in detail the existence of government subsidies and lower wage scales abroad. At the same time, the reports recognize that the undesirable impact on domestic trade caused by the mail subsidy program had to be eliminated.[23]

---

[22] *Id.* at 1-2.

[23] S. Rep. No. 1721, 74th Cong., 2d Sess. 1-12 (1936); H. Rep. No. 1277, 74th Cong., 1st Sess. 1-18 (1935).

b. *Title V.*

Congress set out the framework of the CDS program in Title V of the Act. Title V, as enacted in 1936, is identical in most material respects to the legislation which exists today. Section 501 authorized the payment of CDS for vessels to be used in the foreign trade. Section 506 established exceptions to this general rule which are the same as those provided in the present section, except that the period in which ships could engage in nonincidental domestic trade was limited to three months, instead of six. Section 509 provided for assistance in the financing of vessels to be employed in domestic trade, but prohibited use of CDS.

Both the legislation, on its face, and the accompanying committee reports indicate that Congress intended to create a comprehensive scheme dealing with all circumstances under which CDS vessels could be used. There is not the slightest indication that vessels built with CDS could engage in domestic trade, except as provided by Section 506. Indeed, the clear intent of Congress in enacting Title V of the Act was to erect a wall of separation between the foreign and domestic trades.

The Act, as originally passed by the House, unquestionably dealt with all the circumstances in which CDS vessels would engage in domestic trade. Section 506 of H.R. 8555, passed by the House on June 27, 1935,[24] did not provide for "temporary" waivers of CDS trading restrictions. Rather, the bill allowed for permanent waivers, on the conditions that CDS be repaid and that a waiver be granted only to replace

[24] 79 Cong. Rec. 10289 (1935).

an existing unsubsidized vessel or to fill a demand for transportation which could not be met by the existing unsubsidized fleet.[25] The Section provided, in relevant part,

> (a) Every vessel in respect of which a construction subsidy has been paid pursuant to this part shall be documented under the laws of the United States, and in case of construction, shall remain so documented under such laws for not less than 20 years from the date upon which the construction of such vessel is completed or in case of reconditioning, for not less than the life expectancy of the vessel as determined by the Authority.
>
> (b) No vessel in respect of which a construction subsidy has been paid pursuant to this part shall be operated other than exclusively in foreign trade, unless the owner of such vessel shall receive the written consent of the Authority to so operate, and shall agree to pay to the United States, and

[25] Section 506, as passed by the House in 1935, represented a refinement of the first crude outlines of the CDS program. The roots of the program originated with the Black Report, which proposed that the mail subsidy program be replaced with a direct construction subsidy program. To protect the domestic trade, the Report suggested that all ships built with subsidy be excluded from domestic trade, unless the subsidy was repaid in full. Black Report, at 44. The initial versions of Title V introduced in both the House and Senate as part of identical companion bills incorporated the Black Report's suggestions with little modification; vessels built with CDS were prohibited from engaging in domestic trade, unless the Government permitted otherwise and CDS was repaid. No further restrictions were placed on the waiver authority. S. 2582, 74th Cong., 1st Sess. § 504 (1935); H.R. 7521, 74th Cong. 1st Sess. § 504 (1935).

shall have furnished a bond or other security satisfactory to the Authority to secure such payment, the amounts hereinafter provided:

. . . .

(c) *In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction-differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel.*[26]

The comprehensive nature of the statute is confirmed by the report of the House Committee on Merchant Marine and Fisheries, which provides,

Sections 501 to 506 authorize citizens of the United States (as defined in section 2 of the Shipping Act) to apply for aid in the construction or reconditioning of vessels to be used in an essential foreign service. The Authority shall approve the application only if it finds that the service requires a new or reconditioned vessel to meet competitive conditions or to promote foreign commerce, that the proposed vessel will meet the needs of the service and the requirements of commerce, that the applicant possesses the necessary ability, experience, and financial resources, and that the granting of the aid is calculated to carry out the purposes and

[26] H.R. 8555, 74th Cong., 1st Sess. § 506(a)-(c) (1935) (emphasis added).

policy of the act . . . . The construction-differential subsidy shall equal the excess of the American cost over the fair and reasonable cost to a principal foreign competitor . . .
.

All vessels in respect of the construction of which a construction subsidy has been paid shall be documented under the laws of the United States for 20 years and shall be operated exclusively in the foreign trade. The Authority may, on certain conditions, consent to the operation of such a vessel in the domestic trade in which case the amount of the subsidy shall be repaid to the United States proportionately in accordance with formulas prescribed in section 506(b).[27]

It is noteworthy that the House bill was much like what the petitioners and Federal parties would have the present legislation. Subsection (c) quoted above allowed the Authority to grant a permanent waiver. And subsection (d) then allowed the Authority to revoke at its pleasure a permanent waiver once granted:

(d) Any consent given by the Authority under this section for operation other than exclusively in foreign trade may be revoked by the Authority at any time.[28]

The net result would have authorized the waiver granted the STUYVESANT and then the revocation of the waiver along with forgiveness of the balance of the note when it became opportune for the STUYVESANT to reenter foreign trade.

[27] H. Rep. 1277, ~~at 21-22 (emp~~hasis added).
[28] H.R. 8555, 74th Cong., 1st Sess. § 506(d) (1935).

The Senate, however, was not prepared to allow the CDS program to present to operators in the domestic trade a threat so reminiscent of the mail subsidy. The version of H.R. 8555 first reported to the Senate deleted the material found in subsections (c) and (d) of section 506 of the House-approved bill and instead limited non-incidental domestic uses of vessels built with CDS to three months in any year.[29] This provision closely approximates that found in the 1936 Act.

The Senate Commerce Committee Report on S.3500, the Senate equivalent of H.R.8555, makes quite clear that Section 506 was not limited to temporary waivers, but was to describe all permissible waivers. Indeed, the report does not even make specific mention of the three month limitation, but speaks instead in terms of permitted domestic uses. The report provides,

> Part I of this title provides for the payment by the Authority to the shipbuilder of the difference between the American and foreign cost of building such ship. The new ship must be one required for foreign commerce and suitable as a naval auxiliary . . . .
>
> *In S.3500 the granting of a construction subsidy has been limited to vessels to be engaged only in foreign commerce.* It has been urged with insistence that a construction subsidy should also be authorized for ships to be used in the joint coastwise and foreign

[29] H.R. 8555, 74th Cong., 1st Sess. § 507 (introduced in the Senate May 13, 1935; reported, with an amendment, July 29, 1935).

> trade. It has been urged that under some circumstances the combination of coastwise and foreign trade might permit the construction of larger and faster ships than would be justified for either of these trades separately. It is stressed, too, that these larger and faster ships might be more efficient, not only in developing our foreign commerce, but also more desirable as naval auxiliaries. If such joint coastwise and foreign trade should be authorized, it was suggested that the construction subsidy should be reduced in the same proportion that the revenues derived from the coastwise trade bear to the total revenues in the joint coastwise and foreign trade. While recognizing the merit of these contentions, your committee has felt that for the present a construction subsidy should not be authorized for the joint coastwise and foreign trade.
>
> *The bill makes an exception to cover the case of American vessels engaged in what would otherwise be foreign trade, but which call at ports of our island possessions, Hawaii and Puerto Rico. Likewise exception is made for vessels engaged in the intercoastal trade but which are also engaged in foreign trade between intermediate foreign ports.*
>
> In the latter case, however, they could be permitted to carry passengers and mail, but could not carry cargo between American ports. In each of such exceptional cases the construction subsidy would be reduced in proportion to the amount of the revenues

derived from the domestic or protected part of such trade as compared with the entire revenue. . . .[30]

The legislative history further reveals that Congress intended that the authority to grant even a three-month waiver be exercised sparingly. At the hearings on S.3500 before the Senate Commerce Committee, the following colloquy occurred between Senator Bennett Clark of Missouri and J. M. Johnson, Assistant Secretary of Commerce:

> MR. JOHNSON. And, Senator, it does not make any difference how you write your law; it all hangs on your Authority. If you have a good Authority of integrity, industry, and skill, they will safeguard the interests of the Government.
>
> SENATOR CLARK. Our experience in this country with shipping authorities has been extremely unfortunate.
>
> MR. JOHNSON. You have got to have a good Authority.
>
> SENATOR CLARK. If we take a lesson from the past, that should be a warning against such a blanket authority.
>
> MR. JOHNSON. Those several weaknesses are taken care of in this bill, and they can only make exceptions after formal hearings and applications and determinations.[31]

---

[30] S. Rep. No. 1721, at 14-16 (emphasis added).

[31] *Hearings on S.3500, S.4100, S.4111, Merchant Marine Act, 1936, Before the Senate Committee on Commerce*, 74th Cong., 2d Sess. 11 (1936).

Although its purpose was apparent, section 506, as enacted in 1936, was not a model of clarity. The actual language of the section was a potpourri of phrases taken from the many bills introduced by the three major proponents of the Act, Senators Copeland, Gibson, and Guffey.[32] One passage in the section suggested that permanent waivers would be permitted upon repayment of subsidy. That passage was followed by a sentence limiting use of vessels built with CDS in domestic trade to three months in any year. Whether Congress believed that deletion of original subsections (c) concerning the granting and (d) the revocation of permanent waivers removed permanent waiver authority from the Act or that the three month clause of section 506 limited the more general waiver clause immediately preceding it is not clear. What is clear is that Congress never intended to grant an unlimited waiver authority, that the Committee reports accompanying the bill which was enacted in 1936 make no mention of permanent waivers, and that, in 1938, Congress removed the language suggesting that permanent waivers were permissible for the express purpose of making clear its intent to prohibit such waivers.

Section 506, as amended in 1938, reads virtually as it does today. The amendment made two material

---

[32] *See* H.R. 8555, 74th Cong. 1st Sess. § 507 (introduced in the Senate May 13, 1935; reported with an amendment, July 29, 1935); S.3500, 74th Cong. 2d Sess. § 506 (introduced in the Senate January 6, 1936); S.3500, 74th Cong. 2d Sess. § 506 (introduced in the Senate February 24, 1935); S.4110, 74th Cong., 2d Sess. § 27 (introduced in the Senate February 24, 1936); H.R. 8555, 74th Cong., 2d Sess. § 506 (introduced in the Senate April 24, 1936); S.3500, 74th Cong., 2d Sess. § 506 (Committee Print March 1936). These legislative proposals are set forth in an Appendix to this Brief.

changes in the section. First, the three-month limit on non-incidental domestic use was extended to six months. Second, language which could have been construed to permit other waivers of trading restrictions was deleted. The legislative history reveals that Congress deleted the language to remove all ambiguity concerning the nonavailability of permanent waivers.

The 1938 amendments to the Act were adopted at the behest of Joseph P. Kennedy, Chairman of the United States Maritime Commission.[33] Chairman Kennedy went before committees of both the Senate and the House in December 1937 to propose specific revisions of troublesome provisions in the Act. Explaining his proposed revision of section 506, Chairman Kennedy testified that the provision was inadvertently confusing on the subject of using vessels built with CDS in domestic trade, and that the section should be changed to reflect more clearly Congress' original intent to prohibit use of such vessels in non-incidental domestic trade, except for temporary emergency periods. He testified:

> *Section 506 has been entirely rewritten to remove ambiguities and confusion.* The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. *There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission consents to such use and the owner repays part of the construction differential subsidy. Whether this right is restricted to the cases of emergency and to periods of 3 months as mentioned in the section, it is difficult to determine.*
>
> As the section is rewritten it is perfectly clear that if the owner engages in the services, other than foreign, which are enumerated in the section, he is required to repay a part of the construction-differential subsidy to be determined upon the relation which the gross revenue derived from the domestic trade bears to the entire gross income derived from the voyages completed during the preceding year.
>
> *If the owner desires to engage in domestic trades other than those enumerated in the section, he can do so only by receiving the consent of the Commission. The consent for this service is limited to 6 months in any one year.* If the owner operates under such consent, he is required to repay to the Commission a part of the construction-differential subsidy, to be determined upon the relation which the period of such use bears to the entire economic life of the vessel. During the period of such use the owner is prevented from receiving any operating-differential subsidy.
>
> It is believed that the section as rewritten will result in improved administration

[33] The Commission was, at that time, the authority charged with administering the Act.

and will protect the interests of the Government and those of the carriers, both foreign and domestic.[34]

The House and Senate adopted the amendment of section 506 suggested by Chairman Kennedy. The committee reports clearly echo the Chairman's interpretation of the 1936 Act and the purpose of the revision.[35]

Chairman Kennedy's interpretation of Congress' intent in 1936 and his explanation of the action to be taken in 1938 are entitled to great deference. The Chairman headed the agency charged with administering the Act; the interpretation was contemporaneous with enactment; the Chairman was instrumental in drafting the legislation and obtaining its passage; the interpretation is consistent with the Act; and Congress ratified the interpretation. Under such circumstances, courts normally resolve legislative ambiguities in accordance with the administrator's interpretation. *See*, *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Moreover, the House and Senate reports accompanying the 1938 amendments independently affirm this interpretation of the Act. These reports resolve, beyond doubt, that section 506 was designed to cover all, not just some, instances of permissible waiver. And the only waivers permitted for nonincidental domestic use were for six months or less. Longer waivers called permanent, temporary, or otherwise, simply were not permitted.

[34] *Hearing on S.3078, Before the Senate Committee on Commerce*, 75th Cong., 2d Sess. 8-9 (1937) (emphasis added).

[35] S. Rep. No. 1618, 75th Cong., 2d Sess. 12-13 (1938); H. Rep. No. 2168, 75th Cong., 3d Sess. 21 (1938)

Although Title V has been amended on several occasions since 1938, the basic principles concerning the payment of subsidy and waiver of trading restrictions have never been altered. In 1951, the trade route concept was eliminated from Section 501.[36] This amendment was intended to permit all foreign commerce to be treated equally.[37] In 1959, the Act incorporating Hawaii into the Union amended Section 506 to retain the existing exception for trips to the Orient by way of the islands.[38] The Committee report reaffirms the general rule of exclusion, as well as the exception.[39] In 1970, Section 501 was amended to provide for CDS payments directly to shipyards.[40] The amendment was designed to make CDS more available and thereby assist a major revitalization of the subsidized fleet through increased CDS construction.[41] The general principles of subsidy payment embodied in the 1936 Act were reaffirmed in both committee reports.[42]

Petitioners' and the Federal parties' interpretation of the Act's legislative history as an endorsement of permanent waivers cannot withstand scrutiny. Petitioners and the Federal parties assert that statements in the Black Report suggesting that CDS repayment could prompt trading restriction waivers and provisions in early drafts of the Act adopting this concept prove that Congress in-

[36] Act of July 17 1952, 66 Stat. 760, 765.

[37] *See* H. Rep. No. 2221, 82 Cong., 2d Sess. (1952).

[38] Act of March 18, 1959, 73 Stat. 12.

[39] S. Rep. No. 80, 86th Cong., 1st Sess. (1959).

[40] Merchant Marine Act, 1970, 84 Stat. 1018.

[41] H. Rep. No. 91-1073, 91st Cong., 2d Sess. (1970); S. Rep. No. 91-1080, 91st Cong., 2d Sess. (1970).

[42] H. Rep. No. 91-1073, at 17-18; S. Rep. No. 91-1080, at 9-11.

tended to permit such conduct in 1936 and 1938. *Brief for the Petitioners*, at 33-34; *Brief for the Federal Parties*, at 56-67. When these early efforts are viewed in the context of the entire evolution of section 506, culminating in 1938, it becomes clear that just the opposite is true. As the statute was refined, Congress came to realize that while subsidized operators needed some flexibility in choosing between foreign and domestic trade, unsubsidized operators could not tolerate unlimited permanent competition from vessels built with CDS. The balance struck was to remove the language permitting permanent waivers and to permit waiver of trading restrictions for three, then six, months in any year. The early inclusion in section 506 of provision for permanent waivers only confirms that the section is not silent on the subject, but is designed, instead, to prescribe the totality of permissible waivers.

Despite compelling evidence that Congress intended section 506, as finally enacted, to prohibit permanent waivers of trading restrictions on vessels built with CDS, petitioners and the Federal parties conclude that the section permits such waivers. The *only* contemporaneous authority cited for this proposition is a single statement made by Senator Guffey during hearings on the 1936 Act. According to the petitioners and the Federal parties, Senator Guffey construed section 506 to permit permanent waivers with repayment of CDS and three month waivers without any repayment. *Brief for the Petitioners*, at 36-37; *Brief for the Federal Parties*, at 58-59.

To place the Guffey statement in perspective, it must be realized that the Senator was not describing the same section 506 eventually enacted by Congress.

Rather, Senator Guffey's comments were addressed to the Committee Print of S.3500 prepared for the 1936 hearings. The Committee Print differed from the act passed by Congress in that section 506(c) limited the authority to grant permanent waivers to those cases where there were not adequate unsubidized vessels available or where an unsubsidized vessel was to be retired from service. S.3500, 74th Cong., 2d Sess. § 506(c) (Committee Print 1936). Senator Guffey expressly recognized these limitations, noting that section 506(b), as then drafted, permitted operation of vessels built with CDS in trades other than foreign, "except as later provided." *Hearings on S.3500, S.4100, S.4111, Merchant Marine Act, 1936, Before the Senate Committee on Commerce*, 74th Cong., 2d Sess. 124 (1936). Thus, the open-ended waiver authority suggested by petitioners and the Federal parties was never considered by Congress and never adopted by any member of Congress, including Senator Guffey.

In addition, Senator Guffey spoke only for himself. He did not speak for Congress, the Senate, or even the Commerce Committee. The statement cited by petitioners and the Federal parties was inserted in the hearing record solely at Senator Guffey's request and was never expressly approved by the Committee. When the Committee spoke for itself, in the form of Senate Report No. 1721, the language used was in no way similar to that of Senator Guffey.

Finally, but of paramount importance, the history of the 1938 amendment of section 506 is in direct conflict with Senator Guffey's earlier statement. Chairman Kennedy described the section's provisions on the use of vessels in domestic trade as ambiguous.

The Senator, on the other hand, had seen no ambiguity in section 506 and stated that CDS did not have to be repaid during periods of temporary emergency use in domestic trade. Congress, as evidenced by the Committee reports, agreed with the Chairman and removed the ambiguity by striking the only language in the section even remotely suggesting a power to grant permanent trading restriction waivers. Surely, the interpretation of the statute offered by Chairman Kennedy and the revisions enacted by Congress are more persuasive authority than the isolated and obsolete comments of Senator Guffey.

Petitioners and the Federal parties attempt to avoid the plain impact of the 1938 legislation by asserting that Congress was somehow misled into removing the language in the Act arguably authorizing permanent waivers. *Brief for the Petitioners*, at 44-47; *Brief for the Federal Parties*, at 61. They fail to explain why, if ambiguity existed only as to the requirement of subsidy repayment during periods of temporary emergency, it was necessary even to amend the initial sentence of section 506, which made no reference to temporary waivers, let alone to remove from that sentence the very language on which they rely. No explanation is offered because none is possible.

Their reliance on the House Report statement that the 1938 amendment made "[n]o fundamental change in the original purposes of the section," similarly fails to advance their analysis. The original purpose of section 506 was to prevent unfair competition between vessels built with CDS and the unsubsidized fleet. Thus, even if Congress intended section 506 to permit permanent waivers in 1936,

deletion of the authority in 1938 would not work a fundamental change in the section's original purpose. Of course, if, as was the case, Congress never intended section 506 to authorize permanent waivers, the 1936 amendments clearly worked no fundamental change.

Petitioners and the Federal parties also attempt to elicit support from the 1938 testimony of Edgar C. Luckenbach. Again, this serves only to prove the correctness of respondents' position. Mr. Luckenbach, an unsubsidized operator, called without success for a complete prohibition on trading restriction waivers, including three month temporary emergency waivers. Congress' rejection of this suggestion shows not that permanent waivers were permitted, but that a balance was struck between the competing interests of subsidized operators and of unsubsidized operators. The balance was not to prohibit all waivers, but to limit waivers to six months in any year.

Ultimately, the arguments of petitioners and the Federal parties prove too much. If Congress truly intended section 506 to authorize permanent waivers in 1936, and if Congress did not intend to repeal that authority in 1938, then that authority must remain in section 506 to this day. Yet, at no time in this litigation has any party even suggested that section 506 authorized the Secretary's action with respect to the STUYVESANT. Indeed, petitioners and the Federal parties look everywhere but to section 506 for such authority. They do not look to section 506 for authority because it contains none. As summarized by the Court of Appeals:

> No one in the present case . . . now contends that § 506, as amended, authorizes

permanent waivers. The trial court specifically so stated, and looked elsewhere in the statute for inherent authority in the Secretary to do this. However, the 1936 version of § 506 is the *only* provision which any party to this case has ever cited as providing direct authority for permanent waivers. That language is now *gone*, by specific direction of Congress. We cannot believe that by deleting the only language in § 506 which could be argued to permit permanent waivers, and by leaving only language permitting temporary waivers, Congress thereby manifested an intention that the Agency should have *express* authority to issue *temporary* waivers under § 506 and *implied* authority to issue *permanent* waivers, pursuant not to § 506 but to some unexpressed inherent power conferred in other sections of the Merchant Marine Act of 1936.

As we read the legislative history, both permanent and temporary waiver provisions were considered both in 1936 and in 1938 by the Congress, and Congress in 1938 determined on the recommendation of the Maritime Commission, to permit the Agency to grant only temporary waivers. This deliberate Congressional intent, pursuant to a carefully constructed policy to maintain separate subsidized and unsubsidized fleets, cannot be ignored by the Agency and the court on some vague notion of inherent power elsewhere, which it now might be convenient to utilize.

Alaska Bulk Carriers, Inc. v. Kreps, Pet. App. 28a-29a.

5. **The Power to Grant Permanent Waivers Is Neither Administratively Established Nor Congressionally Sanctioned.**

In the face of the overwhelming clarity in Title V, and its legislative history, that CDS trading restrictions may not be waived for more than six months, petitioners and the Federal parties look for legislative intent located outside the title. They suggest that a "long-standing" agency interpretation supports the authority to waive permanently trading restrictions and that the Congress has acquiesced in this interpretation. When examined in the light of prevailing legal standards, these sources neither establish a "long-standing" agency policy on the subject nor evidence congressional acquiescence in any such policy.

The sole instance of a permanent waiver prior to amendment of the Merchant Marine Act in 1972 was the Grace Line episode of 1964. *See*, Decision of the Comptroller General B-155039, 44 Comp. Gen. 180 (1964) (App. 172-180).[43] The remaining "precedents" cited by petitioners and the Federal parties are three purported waivers, all occurring since December 1976. *See Brief of the Petitioners*, at 51-60; *Brief for the Federal Parties*, at 65-66. Like the Grace Line waiver, none of these actions has been tested in the courts. Indeed, two of the waivers are not yet

[43] In 1958, Grace Line was granted CDS to aid in the conversion of two "break-bulk" freight vessels, originally built without CDS, to the more efficient container configuration. When Grace was subsequently prohibited by South American governments from operating the two vessels in the foreign services for which they had been intended, Grace proposed to sell the vessels to a domestic operator and repay the CDS. The Comptroller General ruled that trade restrictions could be waived if the CDS were repaid.

effective. Rather, they are contingent on legislation placing the Virgin Islands within domestic trade. The third case involved a waiver of trade restrictions to allow use of vessels in foreign to foreign trade. The vessels were LNG tankers, which, pursuant to section 905 of the Act, 46 U.S.C. § 1271, are permitted to engage in such trade even when built with subsidy. Repayment of CDS in that case permitted full 87.5 percent purchase price financing under Title XI of the Act.[44]

The four "precedents" relied on by the petitioners and the Federal parties hardly rise to the status of a "long-standing" administrative interpretation deserving judicial deference. The interpretation was not promulgated contemporaneously with the Act's passage; the agency personnel were not involved in the legislative process; the interpretation is at odds with the construction of the Act expressed by the agency through Chairman Kennedy in 1937; and the interpretation is inconsistent with the letter and spirit of section 506. *See, e.g., Zuber* v. *Allen*, 396 U.S. 168 (1969); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Petitioners and the Federal parties nevertheless argue that, by failing to reverse the Grace Line result when amending the Act in 1970 and 1972, Congress "acquiesced" in the Secretary's interpretation of Title V. *See Brief for the Federal Parties*, at 67-69; *Brief for the Petitioners*, at 61. But the mere fact that Congress has not responded to this action hardly entitles it to deference. This Court has made clear that to the extent congressional inaction provides support to an agency's statutory interpretation, the evidence of congressional awareness of the policy must be far greater than that evidenced here.

[44] Since CDS is limited to 50 percent of the initial price, while Title XI limits may be based on purchase price at any point within one year after completion of the vessel, it is possible for the amount of subsidy to be far less than the increased borrowing power later available under Title XI. The repayment of CDS may also be offset by tax benefits, such as the investment tax credit.

Petitioners' attempted reliance on *Zemel* v. *Rusk*, *supra*, well illustrates their failure. In *Zemel*, the plaintiff sought to attack a State Department regulation prohibiting validation of passports for travel to Cuba. Regulations restricting travel to specific areas dated back to 1915. During World War I, travel to several more countries was restricted. In 1926, the present passport statute was enacted, leaving the past agency practice intact. Following the 1926 act, numerous travel restrictions were enforced. Moreover, in 1938, an Executive Order expressly approving the practice was issued. The Order was still in effect at the time Zemel sought to travel to Cuba. This 50 year history of regulatory, legislative, and executive action in a highly visible area stands in stark contrast to the Secretary's ad hoc determination concerning the Grace Line.

For the same reasons, reliance on *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978), is misplaced. In endorsing a longstanding agency interpretation of its enabling act, Justice Marshall stressed both the frequent exercise of the interpretation over many years and the numerous occasions on which formal congressional reports and studies addressed the issue. 439 U.S. at 248 & n.13, 251. Again, the Grace Line episode fails to meet this standard.

What is more important, the entire excursion into the 1970 and 1972 amendments of Title XI is irrelevant as a matter of law. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977); *see United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 135 n.25 (1978). In *Teamsters*, this Court determined whether section 703(h) of the Civil Rights Act of 1964 permitted the continued operation of seniority systems which perpetuated the effects of past discrimination. Between 1964 and 1977, the question had been consistently answered in the negative by eight courts of appeals, numerous district courts, and an unbroken line of Equal Employment Opportunity Commission ("EEOC") opinions.[45] What is more, the conference report accompanying the 1972 amendments to the 1964 Act expressly stated that Congress intended the case law developed since 1964 to govern the interpretation of those sections of the Act which were not being amended.

The section at issue—703(h)—was not amended by the 1972 amendments. The Court construed section 703(h) in the opposite manner of the courts of appeals, the district courts and the EEOC. It dismissed the congressional acquiescence argument with the following language:

> The legislative history of the 1972 amendments to Title VII . . . in no way points to a different result . . . .
>
> [T]he assumption of the authors of the Conference Report that "the present case law as developed by the courts would continue to govern the applicability and construction of Title VII," . . . of course does not foreclose our consideration of that issue. *More importantly, the section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII*, enacted after this litigation was commenced, *are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964*, unmistakable in this case, *that controls.*

[45] *See* 431 U.S. at 378-80 (Marshall, J., concurring and dissenting); 431 U.S. at 346 n.28.

431 U.S. at 354 n.39 (emphasis added).

In light of *Teamsters*, there can be no question that the intent of Congress in 1936, when it enacted Title V, and in 1938, when it amended the relevant portions of section 506, is controlling here. The amendment of the separate Title XI in 1970 and 1972, relied on so heavily by petitioners and the Federal parties as evidence of legislative intent with respect to the waiver of CDS restrictions, is entitled to "little, if any, weight."

Relying on *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), petitioners state that in this case, unlike *Teamsters*, the 1972 legislation declared the intent of the earlier statute, and thus, should be followed. Reliance on *Red Lion* is misplaced. In that case, the declaration of policy followed by the Court appeared in section 315 of the Communications Act, 47 U.S.C. § 315(a). *See* 395 U.S. at 380. In this case, the policy declaration relied on by petitioners and the Federal parties comes not from the statute itself, but from the report of the House Merchant Marine and Fisheries Committee. In this respect, the case more

closely resembles *Teamsters*, where the policy declaration disregarded by the Court appeared in the conference committee report.

Also misplaced is reliance on NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974). In *Bell*, the Court deferred to an agency interpretation of the Wagner Act after Congress re-enacted the statute in the Taft-Hartley Act. No similar re-enactment of section 506 has occurred here. *See United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978) (section 5 of Voting Rights Act of 1965 re-enacted in 1970, 1975); *Commissioner* v. *Noel's Estate*, 380 U.S. 678 (1965) (section 302(g) of Revenue Act of 1926 re-enacted as section 811(g) of Internal Revenue Code of 1939 and section 2042(2) of Internal Revenue Code of 1954).

The final component of petitioners' and the Federal parties' deference-acquiescence theory is that the legislative history of the 1972 amendment to Title XI, independent of the mere fact of amendment, provides insight into the meaning of Title V. But Title XI concerns solely financing guarantees. It in no way governs the CDS program. The specific provision relied on by petitioners and the Federal parties, section 1104(a)(3), provides only that repayment of CDS may be *financed*, in whole or in part, under Title XI. It makes no statement as to whether subsidy may be repaid, except by reference back to Title V,[46] and makes no statement whatsoever about lifting trading restrictions.

[46] It must again be emphasized that the issue in this case is not whether CDS may be repaid, but whether trade restrictions may be lifted. While parties must repay CDS pro tanto to engage in domestic trade, the converse is not necessarily true. Parties may wish to repay CDS for other reasons, including the opportunity for 87.5 percent financing under Title XI and freedom from American flag requirements such as employment of a United States crew. The mere repayment of CDS does not injure domestic operators. It is the lifting of trade restrictions which brings the policy issues underlying section 506 into play.

In what the Court of Appeals labeled a "singularly convoluted line of reasoning," petitioners and the Federal parties rely on language never enacted by Congress. *See Alaska Bulk Carriers, Inc.* v. *Kreps*, Pet. App. 46a. This language purported to extend Title XI assistance to vessel owners repaying subsidy solely to engage in domestic trade. Petitioners' and the Federal parties' position depends on one ambiguous sentence in the House Report explaining the rejection of this language:

> Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayment under the first sentence of section 506 of the Act.

H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 9-10 (1972).

Petitioners and the Federal parties would have this sentence read as an approbation of the Grace Line incident. In context, it seems much more clearly to be a remark on the peculiarity of the incident and, indeed, as much a questioning as an endorsement of its soundness. What is unmistakable is that the Committee determined to leave the matter of CDS repayments to section 506 and not to use section 1104 as a vehicle for legislating on the merits, as opposed to the financing, of such repayments.

This is established by the final sentence of the House report's comment on section 1104(a)(3). This sentence, in plain unambiguous English, states that section 1104 was not in any way intended to extend or affect application of Title V. Indeed, the Senate did not consider the sentence so heavily relied on by petitioners and the Federal parties to be important enough to include in its report. The Senate report does repeat, however, the final statement of the House report that section 1104(a)(3) does not extend or affect Title V. S. Rep. No. 92-1137, 92d Cong., 2d Sess. 9 (1972).

No matter what the meaning of the House report on section 1104, it is entitled to little weight. The substantive pronouncements of a later Congress, like the mere amendment of unrelated provisions in the Act, cannot overcome the expressed intent of the Congress which enacted section 506. *See International Brotherhood of Teamsters* v. *United States*, *supra*.

All three prongs of petitioners' and the Federal parties' congressional acquiescence argument are further undermined by *Securities and Exchange Commission* v. *Sloan*, *supra*, and *Tennessee Valley Authority* v. *Hill*, *supra*. In *Sloan*, the SEC had, for over 34 years, interpreted the Securities Exchange Act to permit issuance of consecutive ten day suspension orders. In the intervening period, Congress had reenacted the relevant provision and the Commission participated in the redrafting of the provision. Further, the subcommittee report accompanying the amendment expressly endorsed the agency interpretation of its suspension power.[47] This Court stated, however, that this recent history could not overcome the intention of the Congress which enacted the 10 day rule in 1934. The Court explained:

> In *Zuber v. Allen* [396 U.S. 168,] 192, the Court stated that a contemporaneous administrative construction of an agency's own enabling legislation "is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings." Here the administrators, so far as we are advised, made no reference at all to their present construction of § 12(k) to the Congress which drafted the "enabling legislation" here in question—the Securities Exchange Act of 1934.
>
> They made known to at least one committee their subsequent construction of that section 29 years later, at a time when the attention of the committee and of the Congress was focused on issues not directly related to the one presently before the Court. Although the section in question was reenacted in 1964, and while it appears that

[47] The Senate Committee on Banking and Currency, when it reported on the proposed 1964 amendments to the Act, stated:

> The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the ten-day period, it determines that another suspension is necessary. The committee accepts this interpretation.

S. Rep. No. 379, 88th Cong., 1st Sess. 66-67 (1963).

the Committee Report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval referred to in *Zuber, supra.*

> We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this. For here its invocation would result in a construction of the statute which is not only at odds with the language of the section in question and the pattern of the statute taken as a whole, but is extremely far reaching in terms of the virtually untrammeled and unreviewable power it would vest in a regulatory agency.

436 U.S. at 120-21.

In this case, the agency similarly did not make its interpretation of section 506 known to Congress during the enactment process. To the contrary, the interpretation offered by Chairman Kennedy in 1937 is diametrically opposed to the Secretary's present stance. Further, the purpose of Congress in amending Title XI in 1972 was not to provide power to waive trading restrictions, but to provide a program of government guaranteed borrowing. Thus, "the Congress was focused on issues not directly related to the one presently before the Court." Finally, awareness of the Secretary's practice is manifested, at best,

by only one congressional subcommittee, and the practice vests "virtually untrammeled and unreviewable power . . . in a regulatory agency." *Sloan* applies to this case with full force.

In *Tennessee Valley Authority* v. *Hill, supra,* there was overwhelming evidence of Congress' approval of the agency's interpretation of the Endangered Species Act. Despite evidence that the snail darter would be wiped out by the dam project, Congress appropriated an additional $29 million to complete the project in 1975. In 1976, after the District Court for the Eastern District of Tennessee ruled that the Endangered Species Act did not preclude completion of the project, Congress appropriated an additional $9 million for the dam's completion. The Senate Appropriations Committee report expressly endorsed the District Court's construction of the Act. S. Rep. 94-960, 94th Cong., 2d Sess. 96 (1976). In 1977, after the Court of Appeals for the Sixth Circuit reversed the District Court, Congress again directed that the project be completed. The House Appropriations Committee stated,

> It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced state of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act.

H.R. Rep. No. 95-379, 95th Cong., 1st Sess. 104 (1977).

The Senate Appropriations Committee stated,

> This Committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which

> were well under way at the time the affected species were listed as endangered. If the act has such an effect, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.

S. Rep. No. 95-301, 95th Cong., 1st Sess. 99 (1977).

This Court, relying on *Sloan*, dismissed these expressions of Congressional intent. 436 U.S. at 192. The legislative analysis of petitioners and the Federal parties should likewise be dismissed.[48] As this Court stated in *Sloan*,

> [T]he existence of a prior administrative practice, even a well-explained one, [does not] relieve us of our responsibility to determine whether that practice is consistent with the agency's statutory authority.
>
> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153-154. But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291" *Volkswagonwerk* v. *FMC*, 390 U.S. 261, 272 (1968).

Securities and Exchange Commission v. Sloan, 436 U.S. 103, 118 (1978); *see Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973).

[48] The Federal parties rely on a 1978 amendment to Title XI as further evidence of Congressional acquiescence in the Grace Line precedent. *See Brief for the Federal Parties*, at 20. This amendment had nothing whatsoever to do with repayment of CDS. The act provides, *in full*,

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that section 509 of The Merchant Marine Act, 1936, as amended (46 U.S.C. 1159), is amended by striking the words "fourteen knots" in the fourth sentence, and inserting in lieu thereof the words "ten knots".

P.L. 95-505, 92 Stat. 1755.

The purpose of this Act is to extend Title XI assistance available under section 1104(b)(2) of the Act to Great Lakes vessels. This was accomplished by lowering the minimum vessel speed requirements in section 509 of the Act, which section 1104(b)(2) incorporates by reference. Great Lakes vessels need not be as swift as ocean-going vessels and, thus, are not in all instances built to operate at 14 knots. See H. Rep. No. 95-1528, 95th Cong., 2d Sess. 1, 3 (1978). Mention of subsidy repayment in the report accompanying this amendment occurs only because section 1104(b)(2) always mentioned such repayment. The report merely paraphrases the statute while describing the status quo. As already noted, subsidy repayment is not the issue here. With respect to Great Lakes vessels, the issue of subsidy repayment never arises. Such vessels, specially designed for the domestic trades, would not have been constructed with subsidy. There is no suggestion in the amendment or the legislative report that ocean-going vessels built with CDS would repay subsidy to enter the Great Lakes trade. Indeed, since these vessels would originally have been designed for the foreign trade, they could have satisfied the 14 knot requirement and would receive no benefit from the 1978 amendment.

6. The Permanent Waiver of Trading Restrictions Will Disrupt the Domestic Trade.

As noted at the outset of this brief, the entire economics of the domestic trade is based on the premise that it will not be invaded by the multitude of vessels built with CDS. This stark reality undermines the fundamental policy rationale offered by petitioners and the Federal parties, that full repayment of CDS erases all consequences of the original CDS payments. If petitioners and the Federal parties prevail here, persons contemplating construction of vessels for domestic trade will be forced to begin the long vessel construction period[49] in a state of extreme uncertainty. As it is, the owner, and his lenders, must take the risk that their market projections prove accurate five years later. It is unlikely in the extreme that prospective owners and lenders will be willing to take such a risk when they know that the Secretary may, at any time, flood the domestic trade with vessels built with CDS.

The need to protect the domestic trade from competition with vessels built with CDS, even after subsidy repayment, was recently recognized by the Federal parties own spokesman. Testifying before Congress on a bill which would permit permanent waivers, Samuel B. Nemirow, Assistant Secretary for Maritime Affairs, stated,

> Mr. Chairman, the owners of Jones Act ships, who have undertaken significant investment risk to assure the availability of shipping to meet U.S. domestic needs, deserve the strongest possible protection against any influx of ships built for the foreign trade with the advantage of construction subsidy. We believe the Bill should explicitly acknowledge the interests of the domestic operators and that it should contemplate the adoption of equitable regulations to govern the conditions under which subsidized ships might be permitted to enter the domestic trades.

[49] The period from execution of the construction contract to delivery usually lasts three to five years for a vessel of the STUYVESANT type and size. Obviously, the decision to commit resources to the vessel must be made some time prior to execution of the contract.

Hearings on Titles III, IV, and V of H.R. 4769, Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee, 96th Cong., 1st Sess., Statement of Samuel B. Nemirow 29 (September 5, 1979).

Whether or not the Assistant Secretary's proposal is well taken is a matter for Congress to decide. Whatever the wisdom of his proposal, the unlimited waiver power argued for in this case provides none of the safeguards recommended by Assistant Secretary Nemirow. Thus, there is strong policy justification for the per se prohibition against permanent waivers incorporated in section 506.

The manner in which the Secretary has treated the question of interest repayment in this case further demonstrates the need for a per se prohibition against permanent waivers. When first granting Seatrain's request for a permanent waiver, the Secretary concluded that interest need not be repaid for the approximately five year period during which CDS monies were held by the shipyard. Such interest clearly constitutes additional subsidy and, thus, must

be recovered, even under the Federal parties' construction of the Act. Yet the Secretary steadfastly defended her decision not to recover this money first before the District Court, then in the January 6, 1978 decision on competitive effect, and finally before the Court of Appeals. In her petition for rehearing by the Court of Appeals en banc, and in this Court, the Secretary asserts an intention to recover the interest. *Brief for the Federal Parties*, at 54 n.59. That the Secretary could make so wrong a determination on this simple question and then defend that decision time and time again argues persuasively against awarding her the broad discretion she seeks. General agency expertise cannot be let to run free.[50] There is simply a point at which Congress must set firm rules. Such a rule is contained in Section 506.

Petitioners' contention that competition from subsidized vessels operating under temporary waivers upsets market projections in the same manner as permanent waivers is plainly incorrect. Six month waivers are awarded only after the Secretary determines that all subsidized vessels are employed and that additional tonnage is required. 46 C.F.R. Part 250. Thus, the six month waiver provision affords the Secretary the flexibility to prevent shortages of tanker supply in the domestic trade, while adequately protecting the unsubsidized fleet. Permanent waivers afford neither flexibility nor protection.[51]

[50] The unfettered discretion requested by the Federal parties would amount to an unconstitutional delegation of the legislative power to the executive. *See A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

[51] As the Secretary admits, it is not possible to assess the competitive impact of a permanent waiver for the entire useful life of a vessel. The Secretary eschews any ability to foresee competitive conditions beyond three years. *See T.T. STUYVESANT- Repayment of CDS, Operations in Jones Act Trade, supra*, (App. 566, 583-84). The Court of Appeals correctly observed that the inability to assess fully the impact of permanent waivers counsels strongly against their use. *Alaska Bulk Carriers, Inc.* v. *Kreps*, Pet. App. 16a-19a.

The Federal parties' contention that the expiration of trading restrictions on vessels built with CDS after 20 years is the functional equivalent of subsidy repayment is similarly flawed. *See Brief for the Federal Parties*, at 52, 63 n.67. The proposition that trading restrictions expire after 20 years is of questionable validity. The sole support cited for the proposition is a proposed amendment to Title V which was never enacted. Even if the proposition were correct, however, it proves nothing. Twenty years constitutes the projected "useful life" of a tank vessel. Thus, its entry into domestic trade after 20 years would, by definition, have, at best, a *de minimis* competitive impact.

The suggestion that limiting domestic trade to unsubsidized vessels unfairly restricts competition is spurious. The very purpose of the Jones Act is to create a protected market, and section 506 is designed to preserve this market. Respondents' presence in the protected trade hardly makes them monopolists. They simply made the sound business judgment to build unsubsidized vessels for delivery in 1977. Anyone else, including petitioners, could have done so at the same time. Anyone, including petitioners, could do so in the future. Indeed, elementary economics may dictate that others will enter the trade in competition with respondents. But any such

entrant will do so in the manner intended by Congress, through the construction of vessels without subsidy.

Petitioners' and the Federal parties' assertion that the STUYVESANT waiver should be upheld because it prevented an American vessel from going into lay up is curious. Substantial numbers of United States built subsidized vessels are presently in lay up despite the Secretary's use of the permanent waiver power. Several of these vessels had applications for six month waivers pending at the very moment the STUYVESANT was admitted to the domestic trade. The owner of one of these vessels vigorously opposed the permanent waiver during the Secretary's consideration of this matter on remand. *See T.T. Stuyvesant-Repayment of CDS*, MSB Docket No. A-124 (Final Opinion and Order on Reconsideration) (Maritime Administration, U.S. Dept. Comm. January 6, 1978) (App. 566). While petitioners understandably favor employment of the STUYVESANT over other vessels, it is difficult to discern how such discrimination furthers the maritime policies of the United States.

Unable to provide a persuasive maritime rationale for the Secretary's actions, petitioners and the Federal parties offer several more general justifications. These justifications all revolve about the plight of the Seatrain shipyard and, consequently, are lacking in appeal. Petitioners' problems are solely the result of their own making. While vessels are usually built to the order of an independent purchaser, Seatrain built the four vessel series including the STUYVESANT on speculation that purchasers engaged in foreign trade would materialize. CDS is intended as a subsidy to shipyards in the sense that it

enables American yards to compete with foreign yards. It is not to be used to insure shipyards against the consequences of managerial miscalculation. That the United States may lose money from these miscalculations as well, a dubious proposition in itself,[52] hardly justifies overriding section 506 and ignoring sound maritime policy.

B. THE COURT OF APPEALS HAD JURISDICTION

1. Introduction

Respondents initiated this lawsuit not merely to bar the STUYVESANT from domestic trade but to challenge the Federal parties' claim of authority to waive permanently trading restrictions on vessels built with CDS. To that end, Respondents alleged in their complaints that the Secretary's actions were contrary to the Merchant Marine Act, 1936. *Verified Complaint (Shell*), ¶ 33, p. 9 (App. 14-15); *Complaint (Alaska Bulk Carriers)*, ¶ 42 (App. 61-62). Respondents prayed for a judgment declaring that the Secretary lacked authority to waive permanently trading

[52] As already noted, the parent of petitioners, Seatrain Lines, Inc., guaranteed the bareboat charter payments with respect to the STUYVESANT. Thus, if the vessel is removed from domestic trade, and can find no other employment, Seatrain Lines, Inc. will simply pay the funds necessary to prevent a default on the bonds guaranteed by the United States and on the promissory note payable to the Secretary of Commerce. Seatrain Lines, Inc. is a publicly held corporation with substantial assets. There is no indication that it could not meet its obligations. The United States indicates that prior to the closing transaction it had not secured a guarantee from Seatrain Lines, Inc. with respect to the shipyard's obligations. If that were true, and if such collateral as was required could not make the United States whole, the permanent waiver is no more than a vehicle for rectifying a serious oversight by the United States.

restrictions and for an order permanently enjoining defendants from exercising such authority. *Verified Complaint (Shell)*, p. 10 (App. 15-16); *Complaint (Alaska Bulk Carriers)* (App. 82-84, 87-91). On November 22, 1977, the District Court entered an Order which granted summary judgment for the Federal parties and petitioners and against respondents on these claims. The Order also granted summary judgment for respondents on the claim that the Secretary improperly exercised her authority and vacated the Secretary's determination. (App. 556). On November 30, 1977, the District Court implemented its decision by directing "that *final* judgment be . . . entered with respect to all *claims* decided by the Court . . ." (App. 558, 559) (emphasis added).

The Federal parties' contention that the District Court Order of November 30, 1977 was not appealable can be disposed of with relative ease. Regardless of the Secretary's decision in the remand proceeding, the judgment entered pursuant to the November 30 Order finally determined respondents' claim for an injunction against the Secretary's permanent waiver authority. The judgment could collaterally estop respondents from ever again litigating the authority issue. It is, with District Court certification, properly appealed under Rule 54(b) of the Federal Rules of Civil Procedure. Without respect to certification, it is properly appealed under section 1292(a)(1) of Title 28, United Stated Code. Finally, the judgment independently meets the tests for appealability under section 1291 of Title 28.

2. Rule 54(b) Supports The Appeal

Rule 54(b) of the Federal Rules of Civil Procedure permits the appeal of orders adjudicating at

least one claim, but less than all claims, in a case. The rule is properly invoked where the District Court disposes of one or more separate claims, orders entry of final judgment, and certifies that there is no just reason to delay an appeal. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436-37 (1956); *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445, 450-53 (1956); *see Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742 (1976). That the claim or claims decided arise from the same transaction as the claim or claims not decided in no way undermines a certification under the rule. *Cold Metal Process Co. v. United States Engineering & Foundry Co., supra*, at 452.

Certification under Rule 54(b) was plainly available to the District Court here. The November 22, 1977 Order, granting summary judgment for the Federal parties on the discrete question of the Secretary's legal authority and finally denying respondents' claims for a declaratory judgment and permanent injunction, resolved separate claims for relief. Adjudication of these claims is a prerequisite to adjudication of the claim remanded to the Secretary, but is in no way dependent upon the outcome of the remand.

The Federal parties' contention that the District Court did not adjudicate a claim, but only a theory of recovery, cannot withstand scrutiny. The remand proceeding ordered by the District Court could not have afforded respondents the ultimate relief they sought on the claims which the District Court decided and certified for appeal under Rule 54(b). The remand would not in any way affect the District Court's holding that the Secretary had authority to

waive permanently trading restrictions. Similarly, the remand could not have resulted in a permanent injunction against the Secretary. At most, the Secretary could have been enjoined from waiving restrictions on one vessel at one point in time. Respondents would, consequently, be confronted with the prospect of participating in an endless series of proceedings in which petitioners and other subsidized operators sought permanent entrance to the domestic trade. Shell would have continued to litigate before the Court of Appeals the question of the Secretary's authority to contemplate permanent waivers, even had she concluded on remand not to grant the waiver requested for the STUYVESANT.

The Federal parties essentially concede that the remand would not provide respondents the full relief requested in the complaint. They assert, however, that continued litigation of the Secretary's authority to grant permanent waivers would not present a concrete controversy. They argue that if respondents prevailed in the remand proceeding, they would have to await the next permanent waiver application to litigate the authority question. *Brief for the Federal Parties*, at 31 n.31.

In their zeal to protect the concept of finality, the Federal parties overlook a most fundamental finality principle, collateral estoppel. Respondents have had their day in court on the issue of the Secretary's permanent waiver authority, and, at the District Court level, they lost. If they were not to attack the District Court's judgment on direct appeal, respondents' future efforts to litigate the issue of the Secretary's authority would run head long into an assertion of collateral estoppel. *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 329-30 (1971); *Southern Pacific R.R.* v. *United States*, 168 U.S. 1, 48-49 (1897).[53] The impact of the District Court's judgment on future challenges by respondents preserves the concreteness of the controversy before the Court of Appeals. That the respondents confronted the final loss of their ability to challenge the Secretary's waiver authority, even if they prevailed on remand, surely proves the separate nature of their claims.

What is more, the Federal parties' attempt to litigate the distinction between separate claims and separate theories is contrary to the fundamental purposes of Rule 54(b) and should not even be countenanced. This Court, in the watershed cases of *Sears Roebuck & Co.* v. *Mackey, supra*, and *Cold Metal Process Co.* v. *United Engineering & Foundry Co., supra*, explained that Rule 54(b) was amended in 1946 precisely to preclude esoteric debate over what constituted separate claims. The Court noted that such debate, which occurred often when under the original Rule 54(b), served only to waste judicial resources and to create uncertainty in the minds of litigants as to when their rights to appeal came into being. Rule 54(b), as now written, provides certainty by placing certification in the control of the District Court. As stated by the Court in *Mackey*,

> [The 1939 version of Rule 54(b)] gave limited relief. The courts interpreted it as not relaxing the requirement of a "final decision" on each individual claim as the basis for

[53] The District Court's holding with respect to the Secretary's authority would also constitute *stare decisis*. This would impact on other persons wishing to challenge the Secretary's authority.

an appeal, but authorizing a limited relaxation of the former general practice that, in multiple claims actions, all the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them. Thus, original Rule 54(b) modified the single judicial unit theory but left unimpaired the statutory concept of finality prescribed by § 1291. However, it was soon found to be inherently difficult to determine by any automatic standard of unity which of several multiple claims were sufficiently separable from others to qualify for this relaxation of the unitary principle in favor of their appealability. The result was that the jurisdictional time for taking an appeal from a final decision on less than all of the claims in a multiple claims action in some instances expired earlier than was foreseen by the losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of appellate proceedings was undesirably increased.

Largely to overcome this difficulty, Rule 54(b) was amended, in 1946, to take effect in 1948. . . . In this form, it does not relax the finality required of each decision, as an individual claim, to render it appealable, but it does provide a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final decisions to be rendered on *all* the claims in the case. . . .

To meet the demonstrated need for flexibility, the District Court is used as a "dispatcher." It is permitted to determine, in the first instance, the appropriate *time when each "final decision"* upon "one or more but less than all" of the claims in a multiple claims action is ready for appeal. This arrangement already has lent welcome certainty to the appellate procedure. . . . A party adversely affected by a final decision thus knows that his time for appeal will not run against him until this certification has been made.

351 U.S. at 433-36 (footnotes omitted).

Justice Burton, speaking for the Court, went on to emphasize that the appellate courts should not second guess District Court determinations of what constitutes a separate claim. Rather, these courts should defer to the District Court unless the certification appears to be a clear abuse of discretion. Justice Burton drove the point home by recognizing that in the case then before the Court the separate nature of the certified claims was in doubt, but that, thankfully, the Court was spared agonizing over the question:

> While it thus might be possible to hold that in this case the Court of Appeals had jurisdiction under original Rule 54(b), *there at least would be room for argument on the issue of whether the decided claims were separate and independent from those still pending in the District Court. Thus the instant case affords an excellent illustration of the value of the amended rule which was designed to overcome that difficulty.* Assuming that the

> requirements of the original rule are not met in this case, we nevertheless are enabled to recognize the present appellate jurisdiction of the Court of Appeals under the amended rule. The District Court *cannot*, in the exercise of its discretion, treat as "final" that which is not "final" within the meaning of § 1291. But the District Court *may*, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay. With equally good reason, any abuse of that discretion remains reviewable by the Court of Appeals.

351 U.S. at 437 (emphasis in first two sentences added).

The certification by the District Court here can in no way be considered an abuse of discretion. By certifying an immediate appeal, the court avoided devoting its own and the parties' resources to adjudicating whether the Secretary properly exercised her discretion to waive permanently trading restrictions with respect to the STUYVESANT until the scope of the Secretary's authority was finally settled. It also ensured that this important legal issue would be reviewed with expedition, and it eliminated uncertainty as to whether the adjudication of the cross-motions for summary judgment was

otherwise appealable as a final order. That the certification created some risk of a second appellate proceeding hardly renders it an abuse of discretion. Indeed, this risk is no more grounds for vacating the Court of Appeals' decision than is the fact that the Federal parties, who let the appeal go forward without objection, did not prevail on the merits.

Although the Federal parties cite several cases concerning the nonappealability of orders involving a remand to an agency, in not one of those cases did the District Court enter a Rule 54(b) certificate. *See Brief for the Federal Parties*, at 29, 31. And while the Federal parties cite several cases in which an appeal pursuant to Rule 54(b) was not heard, not one involved either a remand or the grant of summary judgment against the appellant which would preclude the award of relief requested in the complaint. *See id.*, at 42 n.46.[54] The remand here may make a rule 54(b) certification necessary. It hardly makes one improper.

3. Section 1292(a)(1) of Title 28, United States Codes Supports the Appeal.

Regardless of certification under Rule 54(b), the District Court's Order of November 22, 1977 was independently reviewable under Section 1292(a)(1) of Title 28, United States Code. This provision permits appeal from *interlocutory* orders which "touch on the merits" of a claim by denying requests for injunctions. *Switzerland Cheese Ass'n, Inc.* v. *E.*

[54] In *McNellis* v. *Merchants National Bank and Trust Co.*, 385 F.2d 916 (2d Cir. 1967), the District Court had narrowed the remaining possibility for obtaining relief, but that part of its order was not covered by the Rule 54(b) certification.

Horne's Market, Inc., 385 U.S. 23, 25 (1966); *see Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744-45 (1976). The granting of summary judgment for the Federal parties and against respondents, and the consequent denial of injunctive relief, falls within this provision. Section 1292 (a)(1) applies to denials of permanent, as well as preliminary, injunctive relief when the order denying the injunction does not end the litigation. *See, e.g., Ackerman-Chillingworth* v. *Pacific Electrical Contractors, Ass'n*, 579 F.2d 484, 489 (9th Cir. 1978), *cert. denied*, 439 U.S. ___, 99 S.Ct. 872 (1979); *McGill* v. *Parsons*, 532 F.2d 484, 485 n.1 (5th Cir. 1976); *EEOC* v. *International Longshoreman's Ass'n*, 511 F.2d 273, 276 (5th Cir. 1975), *cert. denied*, 423 U.S. 994 (1975); *Murphy* v. *Landsburg*, 490 F.2d 319, 320 n.2 (3d Cir. 1973), *cert. denied*, 416 U.S. 939 (1974).

The attempted distinction between claims and theories of recovery in no way removes the District Court's Order from the coverage of Section 1292(a)(1). There can be no question that the injunction denied by the District Court differed from that which could have resulted from the remand. The fact that the remand could have provided respondents some relief is immaterial.

The cases concerning remands relied on by the Federal parties are, again, inapposite. *See Brief for the Federal Parties*, at 29, 31. Only *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972), involved an appeal under section 1292(a)(1). In *Pauls*, the District Court granted plaintiffs preliminary injunctive relief and orderd further agency proceedings. The Court of Appeals refused to reach the merits of defendant's appeal from the remand, but it

fully reviewed the award of injunctive relief. Far from supporting the Federal parties, *Pauls* supports appellate review of the merits here.

Only three more of the remand cases cited by the Federal parties involved claims for injunctive relief. In *Bachowsky* v. *Usery*, 545 F.2d 363 (3d Cir. 1976), the District Court ordered a remand without reaching plaintiff's claim for an injunction. The remand order was appealed not by the plaintiff, but by the defendant. The sole ground for appeal asserted by the defendant was section 1291 of Title 28. Thus, this case provides no insight into section 1292(a)(1). Similarly, in *Ringsby Truck Lines, Inc.* v. *United States*, 490 F.2d 620 (10th Cir. 1973), *cert. denied*, 419 U.S. 583 (1974), the Court of Appeals reviewed an order granting injunctive relief. The court, however, based its jurisdiction on section 1291 of Title 28.

In *Boston & Maine R.R.* v. *United States*, 358 U.S. 68 (1958), plaintiffs sought to set aside an adjudication by the Interstate Commerce Commission ("ICC"). Plaintiffs claimed that the ICC could proceed only by rulemaking. Without deciding whether the ICC could proceed by adjudication, the three-judge district court vacated the ICC order and instructed the agency to compile a more complete record. Prior to the remand, plaintiffs appealed the question of whether the ICC could proceed by way of adjudication. Three factors are highly significant: (1) the District Court did not enter judgment against the plaintiffs on any claim, (2) the remand proceeding could have afforded the plaintiffs the precise relief requested in their complaint with respect to rates, and (3) the remand proceeding could

have been conducted as a rulemaking, thereby mooting the precise issued appealed. Here, (1) the District Court entered judgment against respondents, (2) the remand could not have provided respondents the full injunctive relief requested, and (3) the remand could in no way modify the District Court's holding that the Secretary has authority to grant permanent waivers. *Boston & Maine R.R.* in no way argues against appeal in this case.

The Federal parties cite many additional cases involving section 1292(a)(1), but none involve the award of summary judgment against the appellant. Moreover, in each of these cases the appellant could have, through additional proceedings, obtained the precise relief requested. *See Brief for the Federal Parties*, at 44-48.[55]

Finally, the Federal parties attempt to insert in section 1292(a)(1) a requirement of irreparable harm. The attempt must fail. No such requirement exists in the statute and no such showing is necessary. The section is concerned only with appealability. The Federal parties also overlook the facts that the respondents have now suffered the illegal presence of the STUYVESANT in the domestic trade for over two years, and that the District Court's Order, until overturned, would have estopped any collateral attacks on the Secretary's authority.

[55] *Goldstein* v. *Cox*, 396 U.S. 471 (1970), also differs in that it involved an appeal from a three-judge court under 28 U.S.C. § 1253. The Court expressly noted that the standards for appeal of injunctions under section 1253 differed from those under Section 1292(a)(1). 396 U.S. at 475-76.

4. The Appeal Is Consistent With Section 1291 of Title 28, United States Code.

The Federal parties devote the bulk of their argument to disputing whether the case was finally decided for purposes of Section 1291 of Title 28, United States Code. This is largely beside the point. Rule 54(b) requires a final order as to a claim, but does not depend on a final disposition of the case. Section 1292(a)(1) requires only a denial of injunctive relief. Not one case cited by the Federal parties even remotely suggests that a remand necessarily precludes either of these forms of appeal. Indeed, the cases cited suggest that the Order in this case was independently appealable under Section 1291.

The cases involving remand orders relied on by the Federal parties fall into three categories: (1) those in which the defendant agency appealed prior to the award of full relief to the plaintiff,[56] (2) those in which no final order was entered on any claim and the plaintiffs were, consequently, still in a position to obtain full relief,[57] and (3) those in which the order resolved an issue of law and the appeal was enter-

[56] *Bachowski* v. *Usery*, 545 F.2d 363 (3d Cir. 1976); *Barfield* v. *Weinberger*, 485 F.2d 696 (5th Cir. 1973).

[57] *Boston & Maine R.R. v. United States*, 358 U.S. 68 (1958); *Giordano* v. *Roudebush*, 565 F.2d 1015 (8th Cir. 1977); *Silver* v. *Secretary of the Army*, 554 F.2d 664 (5th Cir. 1977); *Dalto* v. *Richardson*, 434 F.2d 1018 (2d Cir. 1970), *cert. denied*, 401 U.S. 979 (1971); *United Transportation Union* v. *Illinois Central R.R.*, 433 F.2d 566 (7th Cir. 1970), *cert. denied*, 402 U.S. 915 (1971); *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), *cert. denied*, 390 U.S. 964 (1968).

tained[58] *See Brief for the Federal Parties*, at 29-31.[59] The cases in the first category have no relevance here, where the plaintiffs appealed entry of judgment against them. The cases in the second category are also inapposite, since respondents cannot obtain full relief through the remand. The cases in the third category suggest that the Federal parties are simply wrong.

The final order rule is not required by the Constitution and, thus, may be judicially modified when justice so requires. In recognition of this elementary principal, this Court has counseled that finality is to be given a practical rather than a technical construction. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The practical construction of the finality standard has resulted in appellate review of orders remarkably similar to that at issue here. In *Ringsby Truck Line, Inc.* v. *United States, supra*, the court

[58] *Ringsby Truck Lines, Inc.* v. *United States*, 490 F.2d 620 (10th Cir. 1973), *cert. denied*, 419 U.S. 833 (1974); *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972).

[59] *Freeman* v. *Califano*, 574 F.2d 264 (5th Cir. 1978), did not involve a remand to the agency. The Court granted summary judgment on the question of liability and requested the agency to produce documents reflecting the amount of damages owed the plaintiff. The agency did not submit the documents and appealed. This case stands for nothing more than the proposition that partial summary judgment as to liability is not a final judgment.

reviewed an order vacating an ICC rate order and remanding for calculation of appropriate restitution to affected shippers. The court observed,

> While it is true that the three-judge court vacated the ICC order and remanded the case "for such further proceedings as may be appropriate," our refusal to entertain this appeal on grounds of nonfinality would elevate form over substance. Although the court below did not address itself to the issue of the shippers' restitutionary counterclaim, it is clear that any right to restitution is dependent upon the validity of an ICC rate cancellation order which has twice been set aside by a three-judge district court. In fact both parties to this appeal agree that the judgment of the court below is final with respect to the validity of the ICC order. The ICC has taken no further action on the remand (an entirely understandable position in view of the fact that the rate increase which its order sought to cancel has been superseded). Any future action for relief brought by the shippers before a single judge would necessarily be subject to dismissal on grounds that the order upon which the cause of action depends has been vacated. In this important sense, the judgment of the three-judge court below is indisputably final.
>
> The finality requirement of 28 U.S.C. § 1291 is meant to be given a practical rather than technical effect. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct.

> 1221, 93 L. Ed. 1528. To deny jurisdiction here would effectively signal the end of appellants' cause of action without any judicial review. We are aware that under normal circumstances a remand to an administrative agency for further proceedings is not a final judgment within the meaning of 28 U.S.C. § 1291. Boston & Maine R.R. v. United States, 358 U.S. 68, 79 S.Ct. 107, 3 L.Ed.2d 34; Pauls v. Secretary of the Air Force, 1 Cir., 457 F.2d 294. But we are unable to apply this rule where, as here, to do so would violate basic judicial principles.

490 F.2d at 624.

Other courts of appeals have also reviewed orders which, in part, remanded matters to an agency where the denial of immediate review could permanently impair the appellant's rights. *See, e.g., Paluso v. Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978)(on rehearing); *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd on other grounds*, 402 U.S. 389 (1971).

In this case, the order granting summary judgment in favor of the Secretary's waiver authority was the District Court's last word on the subject. Thus, as a practical matter, that portion of the case was concluded. Moreover, the order could have estopped collateral attacks on the Secretary's waiver authority, thus making direct review imperative. It is clear that no authority relied on by the Federal parties precludes the appeal taken here. It is also clear that substantial authority exists for finding the District Court's Order appealable, regardless of the Rule 54(b) certification or the fact that injunctive relief was denied, under section 1291.

CONCLUSION

For the reasons stated herein, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

STEPHEN N. SHULMAN
JOSEPH A. ARTABANE
MARK C. ELLENBERG
CADWALADER, WICKERSHAM & TAFT
11 Dupont Circle, Suite 450
Washington, D.C. 20036
(202) 387-8100
Counsel for Respondents Shell Oil Company

APPENDIX

TABLE OF CONTENTS

H.R. 8555, 74th Cong., 1st Sess. § 507 (introduced in the Senate May 13, 1935; reported with an amendment July 29, 1935)

SEC. 507. (a) Every vessel for the construction of which any subsidy has been paid pursuant to this Act shall be documented under the laws of the United States and shall remain so documented for not less than twenty years from the date upon which construction is completed and, in case of reconditioning, for not less than the life expectancy of the vessel subsequent to such reconditioning as determined by the Authority.

(b) No vessel (for the construction of which any subsidy has been paid pursuant to this Act) shall be operated other than exclusively in foreign trade unless the owner of such vessel shall receive the written consent of the Authority so to operate and prior to such operation shall pay to the United States an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid as the remaining economic life of the vessel bears to its entire economic life. In case an emergency arises which in the opinion of the Authority warrants the temporary transfer of a ship, for the construction of which any subsidy has been paid pursuant to this Act to service other than exclusive operation in foreign trade, the Authority may permit such transfer: *Provided,* That no operating differential subsidy shall be paid during the duration of this temporary or emergency period, such period not to exceed three months.

(c) All payments required to be made under this subsection shall be credited to the construction fund, as hereinafter defined.

(e) The owner of any vessel constructed under the provisions of this part shall, if requested by the Authority, carry insurance payable to the Authority in addition to any insurance required to be carried by section 11 (g), as amended, of the Merchant Marine Act, 1920 (U. S. C., Supp. VII, title 46, sec. 870 (g)), in an amount equal to the unamortized amount of

any construction-differential subsidy paid on such vessel. For the purpose of this section the amount of such construction subsidy shall be amortized ratably over the entire economic life of the vessel. The Authority shall upon request of the owner provide for the payment of the premium for such additional insurance, either through an operating differential subsidy or otherwise.

S. 3500, 74th Cong., 2d Sess. § 506 (introduced in the Senate January 6, 1936)

SEC. 506. (a) Every vessel for the construction of which any subsidy has been paid pursuant to this Act shall be documented under the laws of the United States and shall remain so documented for not less than twenty years from the date upon which construction is completed and, in case of reconditioning, for not less than the life expectancy of the vessel subsequent to such reconditioning as determined by the Authority, and in either event, so long as any sum remains due to the Authority or Reconstruction Finance Corporation.

(b) No vessel in respect of which a construction subsidy has been paid pursuant to this part shall be operated other than exclusively in foreign trade, unless the owner of such vessel shall receive the written consent of the Authority to so operate, and shall agree to pay to the United States, and shall have furnished a bond or other security satisfactory to the Authority to secure such payment, the amounts hereinafter provided.

(1) In respect of the time such vessel shall be operated exclusively in coastwise trade, the amount payable shall be an amount which bears the same ratio to the construction differential subsidy paid in respect of such vessel as such time bears to the entire economic life of such vessel, together with interest at 3⅓ per centum on such portion of such amount as remains at any time unpaid and not overdue, and when overdue at the rate of 4½ per centum per annum. Such amount shall be paid in periodic installments of such sums as the Authority may direct,

except that the Authority shall require the whole of such amount to have been paid at the end of the economic life of such vessel.

(2) In respect of the time such vessel shall be operated in joint coastwise and foreign trade there shall be determined an amount which bears the same ratio to the construction differential subsidy paid in respect to such vessel as such time bears to the economic life of such vessel, and of the amount so determined there shall be paid to the Government such proportion of such amount as the gross revenues derived from the coastwise portions of such joint coastwise and foreign trade bear to the gross revenues derived from all portions of such joint trade.

For the purposes of this subdivision the construction differential subsidy shall not include the cost of features incorporated in the vessel solely for reasons of national defense and paid for by the Authority as provided in section 502 (b). All payments required to be made under this subsection shall be credited to the construction fund created by section 602 of this Act.

(c) In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel.

(d) Where the terms and conditions of any sale of a vessel made under the provisions of this Act include deferred payments of the purchase price, or where obligations of indebtedness are purchased and/or a vessel is constructed with the aid of a loan made under section 503 (b) hereof, the Authority shall require the purchaser or owner of the vessel to keep the same insured (1) against loss or damage by fire, and against marine risks and disasters and war and other risks if the Authority so specifies, and (2) by protection and indemnity

insurance; in both instances with such insurance companies, associations, or underwriters, and under such forms or policies and in such amounts, as the Authority may prescribe or approve. The amount of insurance so required shall not be less than the unpaid purchase price and any overdue interest thereon; and if the vessel is operated other than exclusively in foreign trade, the unamortized amount of any construction differential subsidy paid on such vessel. Such insurance shall be made payable to the Authority and/or to the owner as interest may appear, and any portion thereof paid to the Authority shall be credited to the construction fund created by section 602 of this Act. For the purpose of this subdivision the amount of the construction subsidy shall be amortized ratably over the entire economic life of the vessel. The Authority is authorized to enter into any agreement it deems wise in respect to the payment and/or guarantee of premiums of insurance.

S. 3500, 74th Cong., 2d Sess. § 506 (introduced in the Senate February 24, 1936)

SEC. 506. (a) Every vessel for the construction of which any subsidy has been paid pursuant to this Act shall be documented under the laws of the United States and shall remain so documented for not less than twenty years from the date upon which construction is completed and, in case of reconditioning, for not less than the life expectancy of the vessel subsequent to such reconditioning as determined by the Authority, and in either event, so long as any sum remains due to the Authority or Reconstruction Finance Corporation.

(b) Except as otherwise provided in this subdivision no vessel for the construction of which any subsidy has been paid pursuant to this Act shall be operated other than exclusively in foreign trade unless the owner of such vessel shall receive the written consent of the Authority so to operate and prior to such operation shall pay to the United States an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid as the remaining economic life of the

vessel bears to its entire economic life. In case an emergency arises which in the opinion of the Authority warrants the temporary transfer of a vessel for the construction of which any subsidy has been paid pursuant to this Act to service other than exclusive operation in foreign trade, the Authority may permit such transfer: *Provided,* That no operating-differential subsidy shall be paid during the duration of this temporary or emergency period, and such period shall not exceed three months.

For the purposes of this subdivision and of subdivision (e) of section 522, the carrying of cargo, mail, or passengers between a domestic port and a port in any island territory or island possession of the United States shall be considered "semiforeign" trade if the stop at such island port is an intermediate stop on what would otherwise be a voyage in foreign trade. The Authority is also empowered to declare that the carrying of passengers and mail only in the intercoastal service, by American ships in foreign trade between ports of the Atlantic and Gulf seaboard and the Pacific seaboard of the United States shall be regarded as semiforeign trade within the meaning of this subdivision and subdivision (e) of section 522. A vessel for the construction of which a subsidy has been paid pursuant to this Act may engage in joint foreign and semiforeign trade (1) with the written consent of the Authority, (2) upon agreement tc pay to the United States an amount determined as hereinafter provided, and (3) after furnishing a bond or other security satisfactory to the Authority to secure such payment. There shall be determined the amount which bears the same ratio to the construction-differential subsidy paid in respect to such vessel as any period during which the vessel is operated in joint semiforeign and foreign trade bears to the economic life of such vessel, and of the amount so determined there shall be paid to the Government such proportion of such amount as the gross revenues derived from the semiforeign portions of such joint semiforeign and foreign trade bear to the gross revenues derived from all portions of such joint trade.

For the purposes of this subdivision the construction-differential subsidy shall not include the cost of features incorporated in the vessel solely for reasons of national defense and paid for by the Authority as provided in section 502 (b). All payments required to be made under this subsection shall be credited to the construction fund created by section 602 of this Act.

(c) In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction-differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service route, or line in which it is proposed to operate such vessel.

(d) Where the terms and conditions of any sale of a vessel made under the provisions of this Act include deferred payments of the purchase price, or where obligations of indebtedness are purchased and/or a vessel is constructed with the aid of a loan made under section 503 (b) hereof, the Authority shall require the purchaser or owner of the vessel to keep the same insured (1) against loss or damage by fire, and against marine risks and disasters and war and other risks if the Authority so specifies, and (2) by protection and indemnity insurance; in both instances with such insurance companies, associations, or underwriters, and under such forms or policies and in such amounts, as the Authority may prescribe or approve. The amount of insurance so required shall not be less than the unpaid purchase price and any over-due interest thereon; and if the vessel is operated other than exclusively in foreign trade, the unamortized amount of any construction-differential subsidy paid on such vessel. Such insurance shall be made payable to the Authority and/or to the owner as interest may appear, and any portion thereof recovered by the Authority as part of the purchase price shall be credited to the construction fund created by section 602 of this Act. For the purpose of this subdivision the amount of the construction

subsidy shall be amortized ratably over the entire economic life of the vessel. The Authority is authorized to enter into any agreement it deems wise in respect to the payment and/or guarantee of premiums of insurance.

S. 4110, 74th Cong., 2d Sess. § 27 (introduced in the Senate February 24, 1936)

Sec. 27. It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage which includes intercoastal ports of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall pay to the Commission an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided,* That no operating-differential subsidy shall be paid during the duration of this temporary or emergency period, and such period not to exceed three months.

H.R. 8555, 74th Cong., 2d Sess. § 506 (introduced in the Senate April 24, 1936)

Sec. 506. It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop (1) at an island possession or island territory of the United States, or (2) in the Panama Canal Zone, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall

agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided,* That no operating-differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months.

S.3500, 74th Cong., 2d Sess. (Committee Print, March 1936)

SEC. 506. (a) Every vessel for the construction of which any subsidy has been paid pursuant to this Act shall be documented under the laws of the United States and shall remain so documented for not less than twenty years from the date upon which construction is completed and, in case of reconditioning, for not less than the life expectancy of the vessel subsequent to such reconditioning as determined by the Authority, and in either event, so long as any sum remains due to the Authority or Reconstruction Finance Corporation.

(b) Except as otherwise provided in this subdivision no vessel for the construction of which any subsidy has been paid pursuant to this Act shall be operated other than exclusively in foreign trade unless the owner of such vessel shall receive the written consent of the Authority so to operate and prior to such operation shall pay to the United States an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid as the remaining economic life of the vessel bears to its entire economic life. In case an emergency arises which in the opinion of the Authority warrants the temporary transfer of a vessel for the construction of which any subsidy has been paid pursuant to this Act to service other than exclusive operation in foreign trade, the Authority may permit such transfer: *Provided,* That no operating-differential subsidy shall be paid during the duration of this temporary or emergency period, and such period shall not exceed three months.

For the purposes of this subdivision and of subdivision (e) of section 522, the carrying of cargo, mail, or passengers between a domestic port and a port in any island territory or island possession of the United States shall be considered "semidomestic" trade if the stop at such island port is an intermediate stop on what would otherwise be a voyage in foreign trade. A vessel for the construction of which a subsidy has been paid pursuant to this Act may engage in joint foreign and semiforeign trade (1) with the written consent of the Authority, (2) upon agreement to pay to the United States an amount determined as hereinafter provided, and (3) after furnishing a bond or other security satisfactory to the Authority to secure such payment. There shall be determined the amount which bears the same ratio to the construction-differential subsidy paid in respect to such vessel as any period during which the vessel is operated in joint semidomestic and foreign trade bears to the economic life of such vessel, and of the amount so determined there shall be paid to the Government such proportion of such amount as the gross revenues derived from the semidomestic portions of such joint semidomestic and foreign trade bear to the gross revenues derived from all portions of such joint trade.

For the purposes of this subdivision the construction-differential subsidy shall not include the cost of features incorporated in the vessel solely for reasons of national defense and paid for by the Authority as provided in section 502(b). All payments required to be made under this subsection shall be credited to the construction fund created by section 602 of this Act.

(c) In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction-differential

subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel.

(d) Where the terms and conditions of any sale of a vessel made under the provisions of this Act include deferred payments of the purchase price, or where obligations of indebtedness are purchased and/or a vessel is constructed with the aid of a loan made under section 503(b) hereof, the Authority shall require the purchaser or owner of the vessel to keep the same insured (1) against loss or damage by fire, and against marine risks and disasters and war and other risks if the Authority so specifies, and (2) by protection and indemnity insurance; in both instances with such insurance companies, associations, or underwriters, and under such forms or policies and in such amounts, as the Authority may prescribe or approve. The amount of insurance so required shall not be less than the unpaid purchase price and any overdue interest thereon; and if the vessel is operated other than exclusively in foreign trade, the unamortized amount of any construction-differential subsidy paid on such vessel. Such insurance shall be made payable to the Authority and/or to the owner as interest may appear, and any portion thereof paid to the Authority shall be credited to the construction fund created by section 602 of this Act. For the purpose of this subdivision the amount of the construction subsidy shall be amortized ratably over the entire economic life of the vessel. The Authority is authorized to enter into any agreement it deems wise in respect to the payment and/or guarantee of premiums of insurance.